TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 182

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, ET AL., APPELLANTS,

vs.

EMPIRE STORAGE AND ICE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

FILED JULY 29, 1948.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 18, 1948.

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[fol. 1]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI, AT KANSAS CITY, DIVISION NUMBER THREE, MAY TERM, 1946

No. 513,031

EMPIRE STORAGE AND ICE COMPANY, a Corporation, Plaintiff,

vs.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, A. J. Jenkins, Individually

[Caption omitted]

PETITION FOR INJUNCTION—Filed July 8, 1946

1. The plaintiff, Empire Storage & Ice Company, is a corporation of Missouri engaged in the cold storage and warehouse business and in the manufacture of ice and its sale at wholesale. It receives and has goods, wares, mer-[fol. 2] chandise for storage from the United States Government, from customers in Missouri and from many states in the Union; and sells ice at wholesale to buyers in Kansas City, the state of Kansas and elsewhere; and is engaged in both intra- and interstate commerce. Its warehouse, cold storage and ice plants are located at Chestnut and Guinotte Streets in Kansas City, Missouri; and its business is large, profitable and well established, and its customers numerous.

2. The individual defendants, and each of them, are members of the Ice and Coal Drivers and Handlers Local Union No. 953, an unincorporated labor union and association in Kansas City, Missouri, and are not employees of plaintiff; that the members of said union are numerous and it is impossible to make all of them parties here, and plaintiff has made such a number of said members parties defendant as will fairly insure adequate representation of all members; and the individual defendants are made parties individually and as representatives of all other members of said union; that the defendant, A. J. Jenkins, is acting President and business agent of said association; that The Ice and Coal Drivers and Handlers Local Union No. 953 is a local labor

union, an unincorporated union and association located in Kansas City, Missouri.

3. That there is no labor dispute existing between the plaintiff and its employees, and there is no labor dispute [fol. 3] existing between the defendants, and each of them, and this plaintiff; that the employees of plaintiff, except its executives employees, are members of labor organizations and are under contract with plaintiff; that none of plaintiff's employees at said plant are members of defendant's organization.

4. The defendants well knew that plaintiff's employees were members of unions, and that many truck drivers of defendant's patrons and customers were members of unions and would refuse to pass through or cross picket lines if defendants placed picket lines around or about such buildings of plaintiff; that defendants well knew that by placing pickets around or about said buildings would result in the drivers of many of plaintiff's customers refusing to enter said premises for the purpose of delivering or receiving goods there from; that defendants knew that a large portion of the goods, wares, and merchandise, in the course of delivery to plaintiff, was of a perishable nature, and that delays in delivery would result in great loss and damage to plaintiff and plaintiff's customers. Defendants, with such knowledge, have placed pickets about and around the premises operated by plaintiff in its warehouse, cold storage and ice business in Kansas City.

5. Drivers of customers' trucks, a substantial number of [fol. 4] them, have refused and are refusing to pass through or across such picket lines, that defendants are thus preventing said drivers from entering and departing from such buildings and premises and thus interfering with the business of plaintiff in conducting its cold storage, warehouse and wholesale ice businesses, and are thus preventing the union truck drivers employed by customers of plaintiff from delivering goods, wares and merchandise to plaintiff for storage, and from delivering to plaintiff's customers the goods, wared and merchandise and ice from said buildings; that defendants have thus caused and are causing plaintiff's customers to cease delivering goods, wares and merchandise to said warehouse for storage, and preventing the warehouse employees from delivering to its customers goods,

wares and merchandise stored and ice from its premises; and defendants are thus interfering with the business done between plaintiff and its customers and thus causing great and irreparable loss to plaintiff; that such picketing of the buildings and premises of plaintiff was and is for the purpose of forcing and compelling the plaintiff to cease and desist from storing goods, wares and merchandise, and from selling ice to its customers and to the public generally, and to cause employees of plaintiff to break their contracts with plaintiff.

6. That defendants have entered into an unlawful agreement, combination and understanding in restraint of trade, [fol. 5] in the rendition of warehouse cold storage and ice service to the general public, whereunder they have picketed and are, as herein alleged, picketing the buildings of this plaintiff for the purpose of preventing plaintiff from serving its customers in its warehouse, cold storage and ice business, and of carrying out its contracts with said customers as by-law required and forcing the customers of plaintiff to patronize rival businesses, industries and enterprises; that, by reason of such interference with the aforesaid business of plaintiff, plaintiff has lost and will in the future lose very substantial amounts of money in charges and profits, the exact amount of which plaintiff is unable to state; that, by reason of such interference with the aforesaid business of plaintiff, defendants are picketing the buildings of this plaintiff for the purpose of forcing non-union truck drivers and contractors, not members of said Local Union No. 953, to join said union.

7. That the picketing of the aforesaid buildings of this plaintiff by the defendants, and each of them, has inflicted and will inflict upon the plaintiff irreparable damage unless restrained and enjoined by order of this Court. It will be impossible to ascertain how much money and business the plaintiff will lose by reason of such picketing, and plaintiff's damages will be impossible of ascertainment; that defendants are insolvent, are unable to respond in money for the very substantial damages that such picketing has caused [fol. 6] and will in the future cause; that innumerable business transactions with strangers to this cause have been and will be suspended, interfered with or prevented, with the result irreparable damage to plaintiff and customers of this plaintiff and the public in general has resulted;

Wherefore, a temporary injunction, and upon the trial of the cause, a permanent injunction is prayed for by the Plaintiff restraining and enjoining the defendants, and each of them, from placing pickets or picketing around and about the buildings of plaintiff used in the cold storage, warehouse and ice business in Kansas City, Missouri, and thereby preventing the ingress and egress to such buildings aforesaid, and interfering with the business of plaintiff and its service to the public, and for such other and further relief as to the Court may seem mete and proper.

Guy B. Park, Attorney for Plaintiff, Empire Storage & Ice Company.

Duly sworn to by W. Ralph Wilkerson. Jurat omitted in printing.

[fol. 7] [File endorsement omitted]

IN CIRCUIT COURT OF JACKSON COUNTY

ASSIGNMENT OF CAUSE

On Monday, July the 8th, 1946, the same being the 47th day of the regular May, 1946, Term of this Court, said cause was assigned to Division Number Five of the Circuit Court, Jackson County, Missouri.

And afterwards on said Monday, July the 8th, 1946, the same being the 47th day of the regular May, 1946, Term of said Court, comes Plaintiff by his attorney and presents petition for temporary and permanent injunction to the [fol. 8] judge of the court, and comes Clif Langsdale, appearing for the defendants, except A. J. Jenkins, as president of the Ice and Coal Drivers and Handlers Union, No. 953, and objects to the granting of the temporary injunction and restraining order, and the court having considered the same, now makes the following order:

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER ALLOWING TEMPORARY INJUNCTION

Upon reading petition of Plaintiff, it appearing thereby that the plaintiff, under the facts stated in the petition is entitled to the relief prayed for and demanded.

It is ordered, that a temporary restraining order be granted herein enjoining defendants, and each of them, and all members of the Ice and Coal Drivers and Handlers Local Union No. 953 from placing pickets or picketing around or about the buildings of the plaintiff used in the Warehouse, Cold-storage and ice businesses located at Chestnut and Guinotte Streets in Kansas City, Missouri, and thereby preventing ingress and egress of the employees of the customers of plaintiff, and interfering with the business of plaintiff and its service to the public, and for such other and further relief as to the court may seem mete and proper until further order of this court upon plaintiff filing with the Clerk a bond in the sum of $1000.00, conditioned as required by law, with the United States Fidelity and Guarantee Company, a Corporation, as surety.

It is further ordered that defendants be and appear before the Judge of Div. 5, 16th. Judicial Circuit of Missouri, [fol. 9] at the Court House in Kansas City, Mo., at 10 A. M., Thursday, July 11, 1946 and show cause why a temporary injunction shall not issue.

Allen C. Southern, Judge of Circuit Court, Div. 5.

Done this 8th day of July, 1946.

INJUNCTION BOND

Afterwards, to-wit, on said Monday, July 8, 1946, the same being the 47th day of the regular May, 1946, Term, of said court, came the Plaintiff by his attorney and filed injunction bond in the penal sum of $1000.00 with the United States Fidelity and Guaranty Company, a Corporation, as surety thereon, which said bond was approved by the court.

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER TRANSFERRING CAUSE

On Tuesday, July 9, 1946, the same being the 48th day of the regular May, 1946, Term of said court, the Defendant, A. J. Jenkins, by his attorney, filed Application for and Affidavit in Support of Change of Venue, which said application was by the court taken up, duly heard and considered, and by the court sustained.

Whereupon, the court ordered that this cause, being the same, is hereby transferred to Division Number Three, Circuit Court, Jackson County, Missouri, in which all subsequent proceedings in said cause were had.

[fol. 10] IN CIRCUIT COURT OF JACKSON COUNTY

FIRST AMENDED ANSWER—Filed July 19, 1940

1. Come now the defendants, Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry and A. J. Jenkins, leave of court having been had and obtained, and file this, their first amended answer, to the petition of plaintiff heretofore filed herein.

2. Each of the said defendants states that he is a citizen of the United States.

3. Said defendants admit the allegations in paragraph 1 of said petition.

4. Said defendants admit, as alleged in paragraph 2 of said petition, that each of them is a member of Ice and Coal Drivers and Handlers Local Union No. 953, and that none of them is an employee of the plaintiff; and admit that the defendant, A. J. Jenkins, is Acting President and Business Agent of the said Union and that Local Union No. 953 is a local labor union and an unincorporated union and association in Kansas City, Missouri. Said defendants deny each and every allegation in said paragraph 2 of said petition, [fol. 11] not herein specifically admitted.

5. Said defendants, answering the allegations of paragraph 3 of said petition, assert that there is a labor dispute existing between the said defendants and the plaintiff, in that plaintiff is selling ice to peddlers who are not members of the said defendants' union. Said defendants are not sufficiently informed to plead to the allegations of said paragraph.

6. Answering paragraph 4 of said petition, said defendants admit that they have a picket — about and around the premises operated by the plaintiff in its warehouse, cold storage and ice business in Kansas City, and that their

manner in so doing and their right to do so is guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and by Paragraphs 8 and 29 of Article I of the Constitution of the State of Missouri. Said defendants are insufficiently informed to plead to the other allegations in said Paragraph 4.

7. Said defendants deny each and every allegation in the 5th paragraph of plaintiff's petition.

8. Said defendants deny each and every allegation in the 6th paragraph of plaintiff's petition.

9. Said defendants, answering the 7th paragraph of plaintiff's petition state that they are not sufficiently informed as to the allegations therein to plead the same.

[fol. 12] 10. Said defendants state to the Court that plaintiff's said petition fails to state facts sufficient to constitute a cause of action against them, or any of them, and fails to state facts sufficient to entitle plaintiff to the relief prayed for in said petition.

Wherefore, said defendants pray that the restraining order issued be dissolved, and that the said petition be dismiss-.

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

AMENDED MOTION TO DISSOLVE—Filed July 19, 1946

1. Come now the defendants, Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry and A. J. Jenkins, leave of court having been had and obtained, and file this, their amended motion to dissolve.

[fol. 13] 2. Said defendants state to the court that each of said defendants is a citizen and resident of the United States.

3. Said defendants move the court to dissolve the restraining order heretofore issued herein for the reason that the petition of plaintiff, heretofore filed herein, does not state facts sufficient to state a cause of action against the plain-

tiff to the said restraining order, or to any other relief prayed for therein; and that said restraining order is a violation of the rights of said defendants as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and by Paragraphs 8 and 29 of Article I, of the Constitution of the State of Missouri.

[File endorsement omitted.]

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER OVERRULING MOTION TO DISSOLVE

Thereafter, on Monday, July 29, 1946, Defendants' motion to dissolve restraining order heretofore issued herein, was by the court taken up, duly heard and considered and by the court overruled, to which action and ruling of the court the defendants, and each of them duly excepted.

It was thereupon, by the court, further ordered and adjudged that this cause be continued until August 8, 1946, for further hearing on the temporary injunction and demerits.

IN CIRCUIT COURT OF JACKSON COUNTY

ABSTRACT OF RECORD ENTRIES

This cause came on for trial on Thursday, August the 8th [fol. 14] the same being the — day of the regular May, 1946, Term of the Circuit Court of Jackson County, Missouri, at Kansas City, before the Honorable Thomas J. Seehorn, judge of said court, and resulted on the — day of August, 1946, the same being the — day of the regular May Term, 1946, of said court in a decree for plaintiff as hereinafter set out.

And afterwards, to wit, on the — day of ——, 1946, and within the time theretofore allowed by the court, the Defendants presented to said court their transcript of the record on appeal, which on said day was allowed, signed and sealed by the court, ordered filed and made a part of the record, which said Defendant's transcript of record on appeal so signed and so filed, as follows:

Defendants' Transcript of Record on Appeal to the Supreme Court

Be It Remembered, That on Thursday, August 8, 1946 the same being the — day of the regular May, 1946, Term, of the said court, the above entitled and numbered cause coming on regularly for trial before the Honorable Thomas J. Seehorn, Judge of said court.

The Plaintiff appeared by its attorney, Mr. Guy B. Park, Esquire.

The Defendants appeared by their attorney, Mr. Clif Langsdale, Esquire.

Whereupon, the following proceedings were had and entered of record:

[fol. 15] Plaintiff's Case

Whereupon, the Plaintiff to sustain the issues in its behalf, offered testimony, oral and documentary, and made admissions as follows, to-wit:

Mr. Park: Your honor, please, the briefs and statements that have been submitted to you, I think, fully cover the issues and will begin by the introduction of testimony, without bothering you with statements.

Mr. Langsdale: Now, as I understand it, we are trying this case on the merits, that is on the final order, permanent injunction.

Mr. Park: Really, there was a temporary restraining order issued and the matter comes up for hearing as to whether a temporary injunction had been issued. However, I have no objection to——

Mr. Langsdale: (Interrupting) What is the use of taking two bites at it, I am willing to let this be the final trial.

The Court: I understood that is what this was.

Mr. Park: I have no objection to that at all. There will probably have to be some corrections in the record to conform to that.

Mr. Langsdale: Well, the order can be made now that this hearing is on the permanent injunction.

[fol. 16] Mr. Park: I agree. Is that correct?

Mr. Langsdale: Yes.

The Court: You may proceed, gentlemen.

W. RALPH WILKERSON, the plaintiff, being produced, sworn and examined as a witness on the part of the plaintiff, testified as follows:

Direct examination.

By Mr. Park:

Q. Mr. Wilkerson, give your name to the court?

A. W. Ralph Wilkerson.

Q. And you are the President of the Empire Storage and Ice Company, the plaintiff in this case?

A. Yes, sir.

Q. And how long have you been associated with the Empire Storage and Ice Company?

A. Since its inception and incorporation of the Company in May, 1920.

Q. And where is the plant located?

A. It is located, the mailing address is 2722 Guinotte Avenue. It comprises eight and half acres with various building- thereon.

Q. The number of Buildings, please?

A. There are about 7 buildings.

Q. What is the principle business of the company?

A. Storage and warehousing is the primary portion of our business. Cold storage, warehousing various kinds of [fol. 17] merchandise, and manufacture of and sale of ice. We also operate a grain elevator, a public grain elevator.

Q. Now, will you give the court some idea as to the volume of your business, the extent of it?

A. Well, at the present time, I would say that we have in our warehouses under extremely cold temperatures approximately four and half million pounds of perishable products consisting of butter, various kinds of meat, poultry, frozen eggs, frozen fruits and vegetables. Those are the principle products in the freezer, in the coolers. We have approximately, probably four and half or five million pounds, primarily consisting of shell eggs, approximately eleven hundred thirty thousand cases consisting of three million nine hundred thousand eggs. Those eggs are in the shell. We have quite a number of cars of celery, oranges, lemons, various other products that are stored by various parties here, locally, as well as companies in various parts of the United States stored in transit at our plant.

Q. You do both intra- and interstate warehouse business?

A. That is correct.

Q. And your local customers you do the warehouse business with—you have no interest in the products that are left there, they are left there for him, as I understand it?

A. Our company has no interest in the products whatsoever. They are all stored by various owners at various locations.

[fol. 18] Q. And at the expiration of their storage time, or when they want to withdraw them, how is that done, when the owners want their goods?

A. The owner issues an order for us to deliver to their driver the commodity that he may be calling for that is in the warehouse.

Q. That applies to local?

A. That applies to local as well as products in interstate. Also, we have products in the warehouse for the Army Market Center, Quartermaster Department that moves in by truck and moves out by truck, as well as a great many other perishable products that are in the warehouse for national accounts, like Borden's Dairy, Franklin Ice Cream Company, etc. I would say that 85 percent of these four million eggs in the shell that are in the warehouse belong to customers stored in transit from out of town customers in various states, and approximately the other 15 percent belong to local dealers in Kansas City or Kansas City, Kansas.

Q. The merchants on the market are your customers?

A. A large number of the merchants here, locally on the market, are customers of our company and have perishable products stored therein.

Q. You also mentioned that you can manufacture and sell ice?

A. Yes, sir, that is part of our business.

[fol. 19] Q. And the only article that you manufacture and sell is ice?

A. That is correct.

Q. And to whom do you sell ice?

A. We sell ice to the local dealers here in town that are individual contractors owning their own truck. Dealers that have been buying from our company for approximately 20 years. We also sell in carload to the railroads and we sell to some local dealers on the market for ice that they use in icing their perishable products.

Q. Your sales are exclusively wholesale, as I understand it?

A. That is correct.

Q. You sell at wholesale?

A. That is correct.

Q. And by the way, is your plant a closed shop, unionized?

A. Yes, it is unionized by two different unions.

Q. What are the two unions?

A. C.I.O.——

Mr. Langsdale: (Interrupting) Just a minute. I object to the question. The answer is not responsive to the question, at least, part of the question which was, "is your shop a closed shop". His answer was, "that it was unionized". There are a number of different unionizations of shops that are not closed shops, such as maintenance of membership——

Mr. Park: (Interrupting) I withdraw that question. I am not acquainted with the technicalities of the closed shop.

[fol. 20] By Mr. Park:

Q. Are your employees, except executive employees, union men?

A. Except executives and office employees, otherwise they are all union men.

Q. And what two unions?

A. The American Federation of Labor and the Industrial Congress, commonly known as the C.I.O.

The Court: What department is non-union?

A. The office workers and executive employees.

Q. Now, have you a signed contract with the different unions?

A. Yes.

Q. The C.I.O. and the A.F. of L.?

A. We have.

Q. Have you any labor trouble in your plant?

A. No, sir, we have not.

Q. Is there any strike?

A. No, sir, there is not.

Q. Are there any matters of dissension in your plant as between the management and the laborers?

Mr. Langsdale: Just a minute. You mean by that those who work in the plant?

Mr. Park: Those who work in the plant.

A. There is not.

Q. Now, do many of your customers who bring produce to your place for storage and take it from your place after [fol. 21] storage employ union labor?

A. Yes. It is hard to say exactly but I would estimate that of the merchandise stored in our warehouses by local customers, as well as out of state customers, known as stored in transit, that that comes in and out of our plant by drivers that belong to unions, and the product that comes in and out of our plant by transfer truck and local truck, that possibly 85 percent of them are unionized.

Q. That is to say the drivers for your customers are about 85 percent union men?

A. Yes, that is an estimate. I would have no way of knowing accurately.

Q. Now, just prior to the bringing of this injunction suit, did you have any conversation with the president, or acting president, of the defendant members of the defendant union?

A. Yes, I had a conversation with the president of that union.

Q. What is his name?

A. Mr. Jenkins.

Q. What was the first conversation you had with him?

A. He called me up——

Mr. Langsdale: (Interrupting) Wait a minute. Would you mind fixing a time?

Mr. Park: Fix a time.

A. I couldn't recall the exact date.

Q. Just approximately?

[fol. 22] A. I would say approximately 30 or 40 days before this picket line was established at our plant.

Q. Well, now, what was the conversation you had with him?

A. He called me up and said he wanted to talk to me about a matter that would be helpful to him, if I could do so. I told him that that would depend on what he had in mind whether I could or couldn't. He said that I had a number of dealers, contractors, peddlers or whatever you want to call them, that were buying from our ice company

that did not belong to his union, and asked me if I wouldn't cooperate with him by refusing to sell ice to those dealers unless they had an A.F. of L. card or belonged to his union. I told him, after deliberating, that I couldn't consistently do that, that I was hired as a manager of that company to retain business and not drive it away. It would be inconsistent for the manager of the company to do that. Those dealers can buy ice at other plants. They are not compelled to buy from our plant. They did not want to belong to the union and if I took that stand, I felt as though it would be driving business away from the company, and my board of directors, later in talking this over with them, approved of my stand in refusing to do that.

Q. None of these that you are speaking of, the president of this organization that you are speaking of, are employees of yours.

[fol. 23] A. That is correct. None of them are employees of our company.

Q. Are any of the people that you sell ice to employees of your company?

A. No, sir, they are not.

Q. Well, what are they?

A. You are speaking of the ones that buy ice?

Q. The ones that buy ice.

A. Well, they are individual contractors on their own truck or trucks, hire their own men to work for them and deliver their ice to various parts of the city or to dealers. They buy that ice at our plant wholesale and deliver it to various parts of the city and sell at retail.

Q. Do you have anything to do——

Mr. Langsdale: (Interrupting) Just a minute. I wish to ask that part of the answer that describes these people as "individual contractors" be stricken out as a conclusion of law.

The Court: Overruled. Go ahead.

Q. Has your company anything to do; either by contract with these men or otherwise, with the price for which they sell ice, or have you any control over the ice after it is sold?

A. We do not have any control whatsoever as to what they sell their ice for.

Q. In other words, they buy it from you, sell it to whom they please, and at what price they please?

[fol. 24] A. That is correct.

Q. Like you buy a suit or anything else, you have nothing to do with the selling price, is that correct?

A. Yes.

Q. Now, did you later have a talk with—what is the name of that man?

A. Mr. Jenkins.

Q. Did you later have a talk with Mr. Jenkins in regard to this ice matter?

A. Yes, I did, and had some telephone calls with some other parties that he had talked to and information given——

Mr. Langsdale: Object to anything that was said by any other party that called him up. Hearsay evidence.

Mr. Park: Confine yourself to what Mr. Jenkin's said.

A. The other conversation I had with Mr. Jenkins direct was the morning after they established the picket line at our plant.

Q. Who was in company with him?

A. A business agent for another A.F. of L. truck drivers' union. A good many of his members are employees of the Local produce dealers here in Kansas City.

Q. Any of them employees of yours?

A. No, sir.

Q. What was said in that conversation between Mr. Jenkins and the business agent of this other branch of the A.F. of L.?

Mr. Langsdale: Does he know the name of the business agent?

[fol. 25] By Mr. Park:

Q. Do you know the name?

A. I am sorry, I can't recall his name, Mr. Langsdale.

Mr. Langsdale: Do you know what other union he was talking for?

The Witness: A. F. of L.

Mr. Langsdale: Truck drivers' union?

The Witness: It is a union that accepts the truck drivers that serve the local produce market here at Kansas City. You probably know his name yourself. I can't recall it, but he and Mr. Jenkins came into my private office and talked to me relative to this to see if they couldn't induce me at

that time to agree not to sell ice to these contractors that did no belong to his union—that is Mr. Jenkin's union.

Mr. Langsdale: I again object to the use of the word "contractors". There is a legal conclusion. He means these peddlers.

The Witness: No, I mean the contractors.

Mr. Langsdale: I want the court to know that I am objecting to the word "contractors" as a legal conclusion. Not that I think it means anything different, it is purely a legal conclusion. We call them peddlers and we——

The Witness (Interrupting): In answering that question, I mentioned in the original that these men were contractors, dealers or peddlers, whatever term you want to apply to [fol. 26] them.

By Mr. Park:

Q. Back again to your first conversation with Mr. Jenkins, the one you had over the telephone, what did he say to you would be done by his union, if anything, if you didn't comply with his request?

A. If I didn't accede to his request that he would have to use other means at his disposal to force our company to come around to his point of view, and not sell ice to these men that had been buying ice from our company for a long period of years. I told him I had no control over those men, they could buy ice where they saw fit, there were other places in the city where they could buy ice. If I took that stand, I would be driving business away from the company and it would be inconsistent.

Q. Did he make any threat of picketing at that time?

A. Yes, sir, that was the threat he gave me over the telephone, that that would happen, and later, information that I received from different sources——

Mr. Park (Interrupting): Don't say that.

A. (Continuing:) That was the threat I had from him direct.

Mr. Langsdale: That he would take other means at his disposal?

The Witness: Yes.

By Mr. Park:

Q. Now, in this next conversation that you relate on the day the pickets were placed down there, what was the con-
[fol. 27] versation then in your office?

A. With Mr. Jenkins and this other business agent?

Q. Yes.

A. Well, they thought it would be the smart thing for me as manager of the company to accede to their demands and, if I didn't, they would have to continue this picketing and the inference was——

Mr. Park (Interrupting): Now don't——

A. (Interrupting continuing:) If this picket line was continued they very well knew that it would ruin the company's business. I told him that I was going to endeavor to get an injunction to prevent that, that we had no control over this, that there was no trouble within our organization at all and, as a matter of fact, the men that handle this ice at the plant are C. I. O. and not A. F. L., and complications might enter into it if I did attempt to do that.

Q. Now did you tell them what effect—what effect did the picketing have on your receipt and delivery of goods for storage?

A. Well, it just virtually clamped down on the business that we were doing other than the ice that happened to be purchased by non-union contractors, dealers, or peddlers.

Q. Well now, explain to the court what happened when the picket line was established?

A. Well, when the picket line was established at our plant, [fol. 28] any number of dealers on the market automatically, their drivers coming to our plant to pickup perishable goods, such as eggs or celery or apples, their drivers would not go through this picket line and the managers of those concerns stated that their drivers would be fined and they would just simply refuse to go through the picket line. Certain ones came down and had to turn around and go back, and our office called a number of the dealers on the market and told them that this picket line was established at the plant and, to save them embarrassment or trouble, they just, a number of them, didn't send their drivers down, but they told me they could not, of course, permit that to continue, they would have to have this perishable produce out of the plant, and there were others who wanted to bring their produce in.

It would just ruin the company financially if the picket line was maintained there.

Q. What you mean is that the members of any branch of the A. F. of L. would refuse to cross the picket line as long as the picket line was there, is that correct?

A. That is correct.

Q. For that reason, you couldn't deliver your goods to your customers or receive goods from your customers?

A. That is correct.

Q. Did you say anything to Mr. Jenkins about that?

A. Yes, I imagine I did. I don't recall verbatim word for [fol. 29] word conversation with him but I would say that I did.

Q. Your best recollection?

A. Yes.

Q. And what was his attitude when you explained to him that it was hurting your business, aside from your ice business?

A. Well, his conversation was to the effect that he was going to get all of these men that handled ice in the city in his union, and he was going to use every effort within his command to accomplish that purpose.

Q. Was he down there during this picketing?

A. Yes, sir.

Q. Did he know that the A. F. of L. drivers refused to come in and leave your place?

A. Yes, sir.

Q. He is the business agent for this association, is he not?

A. Yes, as far as I know he is.

Q. That is what he represents himself to be?

A. I believe that is correct.

Q. Acting president?

A. I believe so.

Q. Now, have you any tenants in your place of business?

Mr. Langsdale: Any what?

Mr. Park: Tenants.

A. Yes, sir, we have several tenants.

Q. Now, which is the largest of your tenants?

Mr. Langsdale: Just a minute. I object to that for the reason there is nothing competent that makes that material [fol. 30] to the issues in this case that he has any tenants.

The Court: Proceed.

Mr. Park: Your honor,——
The Court (Interrupting): Proceed.

By the witness:

A. We have a tenant on our premises, John J. Meyer, who does a volume of business in excess of several million dollars a year, that deliver sugar. Then they handle exclusively the Del Monte brand of canned goods and flour, and they distribute and sell these products to all of the various grocers in Kansas City and Kansas City, Kansas, and immediate points within a radius of probably 40 miles of Kansas City.

Mr. Langsdale: Object to that answer and ask that it be stricken out. The answer is not based upon any allegation in the petition and immaterial to any of the issues pleaded.

The Court: Overruled. Proceed.

A. (Continuing:) This tenant has drivers belonging to an A. F. of L. Union and if this picket line was continued they, of course, would not be permitted to have access in and out of our premises.

Mr. Langsdale: Object to that as immaterial and not based upon any pleadings, and for the further reason that it is the conclusion of this witness. It is not based upon any facts and for the further reason it isn't the truth. The only picketing done down there is for this ice company.

[fol. 31] The Court: Do I understand, the entire plant was picketed?

The Witness: That is correct. They had a picket in front of our main entrance in which all trucks egress have in and out, and no union driver would cross that picket line. As you probably know, they would be fined if they did.

The Court: Proceed.

Mr. Langsdale: Now, if the court please, it still isn't pleaded and it isn't a fact. You mean to say that the drivers of this so-called tenant didn't cross that picket line?

The Witness: That is not what I said.

Mr. Langsdale: That is what I imply——

The Witness (Interrupting): I said if this picket line continued they would——

Mr. Langsdale: But when the picket line was on those drivers went through the line didn't they?

The Witness: They did not go through. They were delayed that day before the drivers of that union gave them permission to go through that day——

Mr. Langsdale (Interrupting): I move that be stricken out as bound to be hearsay. You can see what we are getting into when he attempts to testify to something that isn't pleaded. Of course, it isn't a fact that any other persons doing business in this building would not go over this picket [fol. 32] line. You would find them in here if that were true.

Mr. Park: If your honor please, we will have before this case is over a member of that firm, an employee of that firm, who will state the full facts as to whether their men do go in or go out.

The Court: Overruled.

By Mr. Park:

Q. These men are tenants of yours, they pay you rent don't they?

A. Yes, sir.

Q. And the rent is considerable?

A. Yes, sir.

Q. You supply them with quarters where goods are stored and kept?

A. That is right.

Q. And kept?

A. That is correct.

Q. And it is part of your warehouse business?

A. Yes, sir.

Q. And one source of great revenue to the company?

Mr. Langsdale: Just a minute. I object to the leading and suggestive conclusions that are asked in these questions. I take it that these people rent their space and run their own business, do they not?

The Witness: I don't run their business for them.

Mr. Langsdale: You don't do anything but rent them space and collect rent?

The Witness: They pay a set price on the——

Mr. Langsdale (Interrupting): You rent space to them. [fol. 33] The Witness: Provided they can do business they——

Mr. Langsdale (Interrupting:) And you have nothing to do with running their business?

The Witness: No, I am not running their business.

By Mr. Park:

Q. Now, what effect will delay in shipping perishable goods have upon, for instance, fruits and goods of that sort brought to you for storage? What is the result if they cannot be placed in your warehouse?

A. If they cannot be placed in the warehouse, they would naturally deteriorate and be an entire loss to the operator or dealer.

Mr. Langsdale: Or go to some other warehouse?

The Witness: If they could get in some other warehouse.

By Mr. Park:

Q. Do you have government produced goods?

A. Yes, sir.

Q. Have you government goods in storage now?

A. Yes, sir.

Q. What proportion of the annual business from the standpoint of bulk revenue does the ice bear to the entire business, the wholesaling of ice?

A. Well, that portion of the business, of the ice that is affected by this is only a small portion of our business. I would say the portion directly affected in the ice end of it is 15 to 20 per cent of our total business.

[fol. 34] Mr. Langsdale: You mean of your total ice business or total business?

Mr. Park: He said ice was 15 per cent of his total business.

The Witness: I meant that the ice business affected by this picket line amounts to 15 per cent of our total volume of business. The other 85 or 80 per cent is warehousing other than ice.

Mr. Park:

Q. You started to make a suggestion to me.

A. Your spoke about one tenant. I said we had several tenants.

Q. Now, the other tenants.

A. The other tenants are the Kansas City Dressed Beef Company, The Royal Meat Company, who are likewise affected by having union drivers that could not come in and out of the plant with the picket line established there,——

Mr. Langsdale (Interrupting:) Object to that as a conclusion of the witness and not based upon any statement of fact or any pleading. I assure the court that it is not the intention of this union to interfere with the drivers of any tenant, anyone else there, except this man's business in selling ice to these peddlers and drivers who are affected, who do business with the Empire Storage Company but not with any of the tenants, and when he makes that statement, it is a conclusion and ought to be stricken out on that account. It is bound to be hearsay.

[fol. 35] The Court: Hadn't you notified him that they could remove goods for a single day and not thereafter?

Mr. Langsdale: Well, that is what he says, but I say that is not based upon the pleading. He says that somebody notified him that he could remove goods for a single day. It is hearsay and a conclusion of this witness.

The Court: Overruled.

Mr. Park: I want to make this suggestion while the point is before you. Mr. Langsdale, the attorney on the other side, is claiming all the time that all this picketing affects is the sale of ice and the delivery of ice. The testimony of Mr. Wilkerson is that the union drivers from the customers on the market came in there and wouldn't cross that picket line.

Mr. Langsdale (Interrupting:) And when he said those that came in to do business with the plaintiff herein, I made no objection, but when he reaches out and states a conclusion, that it affects other businesses down there that have space in the building, that is not based on any pleading and it is a conclusion.

The Court: Overruled. Proceed.

By Mr. Park:

Q. Could you name, to the court, some of the men on the market who attempted to deliver goods and to take goods from your plant while the picket line was being established there and before the temporary injunction was issued, name some of them?

[fol. 36] Mr. Langsdale: Object to that because it is calling for hearsay testimony.

Mr. Park: If he knows.

The Court: Let him answer.

A. I personally know by having talked to the owners of these businesses on the market that their drivers would not cross that picket line. That is common knowledge, Mr. Langsdale, as you know, they won't cross a picket line.

Mr. Langsdale: So long as you confine your testimony to these people who do business with the plaintiff, I am sitting here without any objection.

Mr. Park: That is all I am asking him about, these men who wouldn't deliver goods to him.

The Court: Go ahead.

By the Witness:

A. The Monarch Egg Corporation. Their truck was down there to get products out of the warehouse and he was turned down and could not get across and went back.

Mr. Langsdale: Just a minute. I object to that language "that he was turned down and could not get across and went back". You mean he would not go in?

The Witness: I don't know what happened. I know he had to go back. I wasn't there at the time he couldn't get in——

[fol. 37] Mr. Langsdale: Then I object to the whole testimony as hearsay.

The Court: Overruled.

Mr. Langsdale: When you say the man came back and add to that he was turned down and had to go back, when you admit you weren't there and don't know anything about it, then I object to that as hearsay and, furthermore, it is a conclusion.

Mr. Park: Maybe we can simplify this. From what you said you agreed to this, that some of the A. F. of L. drivers for some of the customers of the plaintiff would not and did not cross the picket line because it was against the union rules——

Mr. Langsdale (Interrupting:) If you want to state that into the record I won't make any objection to it. I am not going to admit anything. There is no objection, the same as if it were testified to by the witness.

Mr. Park: I thought may be you would agree to that and save some time.

The Court: Proceed.

Mr. Langsdale: Of course, it is just plain A, B, C, that the purpose of the picket is to keep other A. F. of L. members, and those who are driving trucks for A. F. of L. unions not to cross the picket line, and I presume that purpose was carried out. Now, is that sufficient?

[fol. 38] The Court: Proceed.

By Mr. Park:

Q. Now, the volume of business interrupted in that manner amounted to what?

A. You mean the proportion of the business of the company that was affected by reason of this picket line being there?

Q. Yes.

A. About 85% of the company's business.

Q. Outside of the ice business, what per cent?

A. Well, I would say about 80%.

Q. Now, the financial effect on the company was and will continue to be what?

A. Well, the company couldn't exist and continue to operate with the picket line there with the firms that we do business with, because 88 or 85 per cent of the people we do business with in the warehousing end have union drivers, either C.I.O. or A. F. of L.; that applies to local as well as to out of town business that we do.

Mr. Langsdale: You don't mean to imply that the C.I.O. drivers are affected by this picket line?

The Witness: I can't answer that. From my personal knowledge, I don't know, Mr. Langsdale.

Mr. Langsdale: Your own drivers are C.I.O.?

The Witnerss: Yes, sir.

Mr. Langsdale: He goes back and forth?

[fol. 39] The Witness: He did that day, yes.

By Mr. Park:

Q. Now, I want to ask you again, I think I have covered it but I am not certain, have you any contract or agreement or relationship with these men to whom you sell ice other than the manufacturer and sale to customers?

A. I don't believe I understand your question.

Q. Have you any agreement or understanding or relationship with the customers to whom you sell ice other than as seller and purchaser?

A. We have contracts to sell ice to certain dealers, contractors, and we have a contract with the Artic Ice Company and by reason of that picket line being established there that day, he could not enter the premises and get his ice.

Q. You mean his union drivers couldn't?

A. His union drivers would not come into the plant and get their ice. They wouldn't cross that picket line and we have a contract with that man to sell him so many tons of ice during certain months of the year, and these are the months of the year during which he is supposed to get that ice.

Mr. Park: I believe that is all at this time.

Cross-examination.

By Mr. Langsdale:

Q. Mr. Jenkins had a number of telephone conversations with your prior to the time the picket line was placed around your plant, did he not?

[fol. 40] A. I beg your pardon?

Q. Mr. Jenkins had a number of telephone conversations with you prior to the time the picket line was placed around your plant?

A. I wouldn't say a number of conversations.

Q. He had more than one?

A. He had one that I distinctly recall but I don't recall of another conversation. There *was* several indirect conversations.

Q. And did he tell you in that conversation that the very large majority of peddlers selling ice in Kansas City were members of the union?

A. He may have. I couldn't say. I don't recall.

Q. And did he tell you that you were the only manufacturer of ice that would sell ice to a non-union peddler.

A. If he did, it is not correct.

Q. Well, the Kansas City Ice Company is the largest manufacturer of ice in this community, is it not?

A. Yes, but not the only manufacturer.

Q. But it does more than the majority of the ice business, does it not?

A. Possibly so, yes.

Q. And you knew that the Kansas City Ice Company would not sell ice to any peddler who was not a member of the Union?

Mr. Park: Objected to as immaterial and not tending to prove or disprove any facts in this case.

[fol. 41] The Court: Let him answer.

A. (By the witness) I know nothing about this business whatsoever.

Q. Now, you answer this question. You know, or have learned, that the Kansas City Ice Company sells ice to no peddler who doesn't have a union card?

A. I haven't been advised to that effect, no.

Q. You haven't been advised to that effect by anybody?

A. Mr. Jenkins told me they wouldn't. I don't know it to be a fact.

Q. You haven't any reason to believe that is not a fact?

A. I have common knowledge that they have sold ice to men that are not members of that union.

Q. Common knowledge. What kind of common knowledge is it you have?

A. By the ones that have said they have bought ice there, not as a general practice, but they filled in and bought a cake or so to fill in on their route.

Q. Isn't it the general practice of the Kansas City Ice Company not to sell ice to any non-union peddler?

A. That is what Mr. Jenkins tells me.

Q. Do you know any other manufacturer of ice that sells ice to any non-union peddlers but yourself?

A. Yes, sir.

[fol. 42] Q. Which one?

A. Federal Cold Storage.

Q. Where is the Federal Cold Storage?

A. It is about a five minute ride across the state line.

Q. Over in Kansas?

A. Yes, sir.

Q. Is there any other manufacturer of ice in Kansas City, Missouri, that sells ice to a non-union peddler, except you?

A. I have men who have bought ice from other plants in Kansas City that don't belong to the A. F. of L.

Q. Do you know of any plant that makes it a practice to sell ice to non-union peddlers, except yourself, in Kansas City, Missouri?

A. I don't know what their practice is. I know that I have bought ice from other peddlers in Kansas City.

Q. How do you know they don't belong to the union?

A. They have told me that.

Q. How do you know about your Federal ice?

A. I——

Q. (Interrupting:) You don't know anything about this——

Mr. Park (Interrupting): Object to him lecturing the witness.

Q. (Continuing:) Federal Cold Storage selling ice to non-union peddlers, do you? Tell the court how you got your information about the Federal?

A. Well, the Federal does the warehousing business the same as we do.

[fol. 43] Q. Now, did Mr. Jenkins tell you that he wanted to get all the peddlers in the union, so as to keep up the wage structure of the people doing this kind of business?

A. I don't recall any words of that kind, no.

Q. Did he tell you that in substance?

A. No.

Q. Did he tell you that he wanted to see that the helpers who worked for these peddlers got a fair wage?

A. I had no conversation of that kind with him at all. That was none of my affair.

Q. Didn't you learn that these non-union peddlers had helpers that they were paying starvation wages?

A. I wouldn't know anything about that.

Q. Did you know these non-union peddlers were paying a minimum wage of $4.00 a day for helpers?

A. I know nothing of that at all.

Q. Did Mr. Jenkins tell you that the objective of getting these men in the union was to keep up the wage structure?

A. I don't recall any conversation of that kind.

Q. You say he didn't tell you that?

A. I said I didn't recall any conversation of that kind.

Q. How many of these peddlers buy ice at the plaintiff's place of business?

A. I suppose we have probably 20 who buy ice from our [fol. 44] company directly and indirectly.

Q. Well, how many of them go down to have their trucks loaded?

A. With ice?

The Court: I don't understand the question.

Q. How many of these peddlers go down to the plant to have their trucks loaded with ice at the plant?

A. Oh, I would say approximately about 12 or 15.

Q. And it was those 12 or 15 that Mr. Jenkins wanted to get into the union?

A. Possibly so.

Q. Did he tell you that there are two hundred peddlers in town and that all the rest of them belong to the union?

A. No, I had no conversation of that kind with him at all.

Q. You knew that if these 12 or 15 peddlers would join the union that the picketing would be stopped, didn't you?

A. I didn't know it but I would assume that if that happened it would be, yes.

Q. That was the purpose of picketing, either to get them in the union or not to have you sell to them?

A. I would assume that would be the purpose of it.

Q. Now, was it so all of this obstruction of your business that you have described could have been stopped by either these men joining the union or you not selling to them, that is correct, isn't it?

[fol. 45] A. Maybe so, I don't know.

Q. Well, that is your judgment isn't it? That was the object of the picketing, wasn't it?

A. Yes, I would assume that was the object of the picketing.

Q. How was the picketing done—by banner?

A. Yes, they had a banner out there. The banner wasn't correctly worded though.

Q. What did the banner say?

A. Well, the banner didn't even have the proper name of our company.

Q. What did it say?

A. It had an erroneous name on the banner.

Q. What did it say?

A. I don't recall the exact wording, Mr. Langsdale.

Q. You said it was erroneous?

A. I remember that particularly because I know the name of our company, and he didn't have the name of our company properly on the banner.

Q. Well, what did he have on the banner?
A. Empire Coal and—Empire Coal Company.
Q. And what did it say?
A. I don't recall the exact wording.
Q. Don't you know what the banner said they were objecting to? It just didn't say "Empire Coal Company" and quit, did it?
[fol. 46] A. I think it said "Unfair to Local —," I don't know the number.
Q. You know it didn't have the "unfair" on it?
A. No, I don't know that because I said I didn't remember the exact wording of it.
Q. You saw it didn't you?
A. Yes. I didn't take a copy of it.
Q. Now, isn't it true that the banner said, "Empire"—whatever it said—"Cold Storage Company sells ice to non-union peddlers"?
A. Yes, I think, it had something to that effect.
Q. And that was the picketing that was done, wasn't it, by one man carrying a banner?
A. That is correct.

Mr. Langsdale: That is all.
Mr. Park: That is all.

(Witness excused.)

Lawrence Tusso, being produced, sworn and examined as a witness on behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Park:

Q. State your name to the court please.
A. Lawrence Tusso.
[fol. 47] Q. Do you buy ice from the Empire Cold Storage and Ice Company, the plaintiff in this case?
A. Yes, sir.
Q. How long have you been buying ice from that plant?
A. 23 years.
Q. Explain how you buy it and what you do with it?
A. I buy and sell it to the public.
Q. How do you buy it?
A. I buy so many tons every morning.

Q. Pay for it?

A. Pay for it.

Q. Have you any understanding with the Empire Storage Company as to what you will do with that ice and who you will sell it to?

A. No, sir.

Q. You are an independent buyer?

A. That is right.

Q. And they manufacture the ice and sell it at wholesale?

A. That is right.

Q. You retail it?

A. That is right.

Q. Have you any helpers?

A. I got two sons been helping me.

Q. How long have they been helping you?

A. Since one of them got out of school and one of them got out of the navy about two months ago.

Q. They live with you?

A. Yes, sir.

[fol. 48] Q. And that is the way you and your family make a living?

A. That is right, that is the way I raised six kids.

Q. Did you ever belong to this union?

A. I belonged when it was first organized.

Q. You are not a member of that union now?

A. No, that was 8 years ago.

Mr. Park: That is all, I believe.

Mr. Langsdale: No questions.

(Witness excused.)

W. Ralph Wilkerson, recalled as a witness on the part of the plaintiff, having been previously duly sworn, testified further as follows:

Redirect examination.

By Mr. Park:

Q. You spoke of some other tenants you had. Do they employ A. F. of L. employees?

A. It is my understanding that they have.

Mr. Langsdale: You mean all the tenants?

By Mr. Park:

Q. Any of your tenants?

A. Yes. We have two other tenants; we have three other tenants other than the one I spoke of.

Q. Name them, please?

A. F. Angelo, U. S. Royal Meat Company, and the Kansas City Dressed Beef and Fish Company.

[fol. 49] Q. Do you know whether any of them employ drivers who are affiliated with the A. F. of L.?

A. It is my impression that each one of them have A. F. of L. drivers.

Q. Well, those drivers, did they transport things back and forth while the picket line was being maintained?

A. No, they didn't attempt to come into the plant because they knew the picket line was there.

Mr. Langsdale: Just a minute. I object to that——

Mr. Park: (Interrupting) I think that could be stricken out.

By Mr. Park:

Q. Did they come in and out the plant while the picket line was there?

A. I couldn't be positive whether they did or not. There were quite a number of drivers that came down there and turned around and went back, when they saw the picket line established. I didn't have somebody out there to check and get the names of those drivers that were turned back or, of their own volition, turned around and went back when they saw the picket line.

Mr. Langsdale: You don't know whether any of those drivers were drivers of these tenants or not?

The Witness: I have been told they were.

Mr. Langsdale: You don't know, do you?

The Witness: Not my personal knowledge, no.

[fol. 50] Mr. Park: We have a witness from the plant who is on his way up here now, a man whose truck was actually turned back.

Mr. Langsdale: You mean it turned around and went back. We will admit that if that is all you want to prove.

Mr. Park: And wouldn't go through the line to deliver or receive goods as long as the picket line was there.

Mr. Langsdale: We will admit that.

Mr. Park: I believe that is all then, your honor.

Whereupon, the plaintiff rested its case.

Mr. Langsdale: Is that your lawsuit? I want to state an oral demurrer for the record. The defendants, Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, and A. J. Jenkins, demur at the end of the plaintiff's case for the reason that no evidence has been offered to show that the plaintiff is entitled to the relief prayed for in its petition or to any relief under the petition, and for the further reason that the petition itself states no facts sufficient to entitle the plaintiff to the relief prayed for herein.

The Court: Overruled.

(To which ruling and action of the court, the defendants, by their counsel, at the time duly excepted and still excepts.)

Mr. Park: It is possible, your honor, that a merchant or a produce dealer, Mr. Helm, will be here immediately [fol. 51] after lunch and we would to put him on to prove

Mr. Langsdale (Interrupting): If you will tell me what he will testify to, I will admit it.

Mr. Park: I'd rather the court would hear his testimony.

Mr. Langsdale: Can you give us some indication as to what he will testify to, may be I won't want to go ahead until you-r- through.

Mr. Park: Well, he will testify to the amount of business he does with the company, and that his driver belongs to the A. F. of L. and that the driver refused to cross the picket line to deliver his goods. I want to show the extent of his business and that it has nothing to do with the ice business whatever.

Mr. Langsdale: I'll admit all that and let you state the extent of his business, any knowledge of whatever you want to state.

Mr. Park: I wouldn't want to state because I don't know, not having talked to the witness. I wouldn't want to put into the record that I can prove a certain thing by a witness if I know I can prove it by the witness.

Mr. Langsdale: I'll admit any amount you want to say together with the other facts you say this witness will testify to. What is the use of bringing the judge back and

[fol. 52] anybody else to hear what one witness will testify, if it can be admitted?

Mr. Park: You won't get through with this witness in one minute.

Mr. Langsdale: I'll get through with him in about five minutes.

Defendant's Case

Albert J. Jenkins, being produced, sworn and examined as a witness on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Langsdale:

Q. State your name?

A. Albert J. Jenkins.

Q. Where do you live?

A. 5241 Swope Parkway.

Q. What do you do.

A. President and business representative of the Ice, Coal and Soft Drink Employees.

Q. That is a labor union?

A. Yes, A. F. of L.

Q. And how many members have you?

A. We have approximately 758.

Q. Is your association affiliated with the truck drivers of Kansas City?

A. Yes, we are affiliated with them, Teamsters Joint Council, No. 56.

Q. How many different locals affiliated with that council?

[fol. 53] A. Approximately 18.

Q. How many members of the labor union's truck drivers are affiliated with the Kansas City joint council, approximately?

A. Well, I would say approximately about between 15 and 20 thousand.

Q. Those are the ones that operate in and out of Kansas City?

A. Yes.

Q. Where is the Council's office?

A. 116 West Linwood.

Q. Is that where the office of your local is?

A. Yes.

Q. These various unions are those who have drivers for different kinds of business?

A. That is correct.

Q. The jurisdiction of your union includes those who sell ice?

A. That is right.

Q. Drive and deliver ice?

A. That is right.

Q. What else does your jurisdiction include?

A. I have the cold storage employees, soft drink drivers, soft drink workers, and coal drivers. The charter reads "ice, cold storage, coal, and soft drinks."

Q. Have you all the soft drink establishments in Kansas City amoung the drivers?

A. All of them, yes.

Q. Including Coca Cola?

A. Yes, sir.

Q. And all of them?

[fol. 54] A. All the soft drinks as drivers, yes, sir.

Q. Now, what ice companies do you have members working for?

A. With all the City Ice.

Q. City Ice Company?

A. City Ice Company, Kansas City Ice Company, City Ice and Fuel, Midwest.

Q. Who is the largest manufacturer of ice in Kansas City?

A. The City Ice Company.

Q. Do they manufacture more than all the rest put together?

A. I wouldn't want to state definitely more than all the rest put together, but right close to it, a fair estimate that they do.

Q. Do members of your union work for the company?

A. Yes, sir.

Q. Does that company sell to non-union peddlers?

A. Not to my knowledge.

Q. Do they have an agreement with you that they won't?

A. That is right.

Q. What other companies in this city refuse to sell to non-union peddlers?

A. City Ice and Fuel, Superior Ice Company, we have that too, that is one I left out.

Q. The one that he named in Kansas City, Kansas, is not union?

A. I couldn't answer, I don't have any members there.

[fol. 55] Q. You don't have any members over there?

A. No.

Q. The people who buy ice, as do these people who have been described by Mr. Wilkerson, are called "peddlers" in the industry, are the- not?

A. That is what they have always been called, ever since I have been in it, since 1930.

Q. Are they eligible for membership in your union?

A. Yes, sir.

Q. How many of the peddlers of that class of ice sellers are there in Kansas City, Missouri, if you know?

A. Approximately 200, I would say.

Q. How many of them belong to your union?

A. About 80, between 75 and 85 per cent of them.

Q. Do you establish a minimum wage for the helpers of those peddlers?

A. We do.

Q. What is the minimum wage?

A. $4.00 a day.

Q. And do those helpers belong to your union?

A. Yes, sir.

Q. Was it your desire, when you talked to Mr. Wilkerson, to have the peddlers who buy at his plant and who don't belong to the union join the union?

A. Yes, sir.

Q. And did you tell him that?

A. Yes, sir.

Q. And is that for the purpose of maintaining your wage [fol. 56] standard?

A. That is correct.

Q. Some of these peddlers pay much less than $4.00 a day?

A. That is right.

Mr. Park: Ask him, don't tell him.

By Mr. Langsdale:

Q. What did you have on the banner that was used in front of the plaintiff's place of business?

A. Well, the wording of the plant, I believe, it was misspelled, that I can't recall exactly. The other wording was that they sold ice to non-union peddlers.

Q. What did you say did that?

A. Empire, Empire Coal and Empire Ice and Storage;

Empire Cold Storage is what we intended, but I think it said coal.

Q. You mean the Empire Ice and Cold Storage Company?

A. That is right.

Q. And it was "cold" that was misspelled?

A. I believe they put it "coal."

Q. At any rate, the banner was carried near the entrance to the plant of the Empire Storage and Ice Company?

A. That is correct. I would say probably between 15 and 25 feet in front of the main entrance.

Mr. Langsdale: That is all.

Cross-examination.

By Mr. Park:

Q. The purpose of this organization, the members of [fol. 57] which are the defendants in this case, is to force all buyers of ice to join your union?

A. I would say all the independent peddlers.

Q. Anybody that buys and sells ice?

A. For resale, I would put it that way.

Q. For resale, you are trying to force them to join your union?

A. I don't——

Mr. Langsdale (Interrupting): Object to the use of the word "force."

By Mr. Park:

Q. Compel them or persuade them to join your union?

A. I would say persuade.

Q. And you are not trying to get the wholesalers of ice to join your union, are you?

A. I don't understand your question, what you mean by wholesalers,——

Q. (Interrupting): A man who manufactures and sells at wholesale?

A. I have them in all the plants with the exception of three in Kansas City.

Mr. Langsdale: You mean the production employees?

Mr. Park:

Q. I am not talking about the employees, I am talking about the owners of the plant.

A. I am not interfering with the owners of the plant, they couldn't belong.

[fol. 58] Q. Mr. Wilkerson, could he belong?

A. No, sir.

Q. He couldn't belong, no official could belong?

A. No, sir, he could not.

Q. Now, what are you trying to get him to do? He can't join your union, what is it you are attempting to do?

A. Merely attempting to organize the unorganized peddler.

Q. Well, why are you boycotting Mr. Wilkerson?

A. Because——

Mr. Langsdale: Just a minute. I object to the use of "boycotting."

Mr. Park: Well that is what you are doing, isn't it?

Mr. Langsdale: That is a legal term and legal conclusion. He is picketing. They are in front of his plant.

By Mr. Park:

A. Don't you know, Mr. Jenkins, as the head of that organization which is an affiliate of the A. F. of L., don't you know that all A. F. of L. drivers or union members are instructed not to do business at that plant as long as there is a picket line there?

A. I don't know anything about what the other drivers are instructed to do.

Q. Isn't that the rule of your organization, not to cross a picket line?

A. It is commonly known that the average driver will not cross any picket line.

Q. Isn't it a rule of your organization?

[fol. 59] A. I would say it is a rule of all organizations.

Q. And the violation of that rule would subject the member to a penalty of some sort, isn't that a fact?

A. Fine or suspension.

Q. Fine or suspension?

A. Yes.

Q. So, you knew when you placed the pickets there that customers of the Empire Cold Storage and Ice Company couldn't deliver their product there for storage?

Mr. Langsdale: Just a minute. We object to that question as beyond the scope of this inquiry.

The Court: Overruled.

By Mr. Park:

Q. You knew the effect that would have, the customer that had A. F. of L. drivers couldn't get his goods taken into or removed from that plant?

A. I wouldn't say that I knew he couldn't. I knew it was customary that the average driver would not cross the picket line.

Q. That is the reason you picketed the company, to keep your A. F. of L. men from going in there and coming out?

A. That is right.

Q. That was your purpose in picketing that place. You knew it interfered with his business, didn't you?

A. I don't know anything about his business, but that was [fol. 60] my intention.

Q. You didn't care anything about his business?

Mr. Langsdale: Object to that as immaterial.

The Court: Let him answer.

By Mr. Park:

Q. You didn't care about the effect it had on his business, you would picket it anyhow regardless of the effect it had upon the business?

A. I would say yes.

Q. That is the very purpose behind the picketing, to coerce the Empire Storage Company into getting members for your union, helping you in getting merbership for your union?

Mr. Langsdale: Object to that as calling for a conclusion of the witness.

The Court: Let him answer.

Mr. Langsdale: It is not based on any fact in this case. The picketing was for the purpose of keeping him from selling to nonunion members.

By Mr. Park:

Q. Isn't it a fact that you went to Mr. Wilkerson personally and told him that if he didn't refuse to sell to non-

union peddlers you would picket the place and interfere with his business?

A. I said nothing with regard to interfering with his business. I told him that if he didn't quit selling to independent peddlers, I would place a picket.

[fol. 61] Q. You knew the effect that placing a picket there would be to interfere with his business?

A. I had no knowledge of what it would do to his business.

Q. But you had an idea, didn't you?

A. I would say I did.

Q. That he would be compelled not to sell to non-union members or to get these non-union members to join your union in order for him to carry on his warehouse business, you knew that didn't you?

A. That is right.

Q. That is what you are down there for?

A. I don't know as I understand your question.

Q. Well, may be I can get it a little clearer. You said to Mr. Wilkerson that you were going to put a picket there, and you knew at the time you told him that, that it would interfere with the warehouse business, didn't you?

A. I was within hopes it would.

Q. That was your purpose in putting the picket there, wasn't it?

A. No, my purpose in putting the picket there was to keep him from selling to the non-union peddler.

Q. But you knew what the effect would be on his business?

A. I didn't exactly know.

Q. You had a pretty good idea?

A. I had some idea.

Q. A pretty good idea. That always follows, doesn't it?

[fol. 62] A. Customarily.

Q. And you knew that, and you went with an associate officer of another local union to Mr. Wilkerson and tried to persuade him to get these men he was selling ice to, to join your union, didn't you?

A. Yes, I was with another official of another local union.

Q. And your purpose was to get him to induce these men he was selling ice to to join the union?

A. Not to sell to the non-union peddlers.

Q. Not to sell. But you suggested that if he would tell them to join the union it would be all right?

A. That was up to me if they joined the union or not.

Q. Well, you have been soliciting them to join the union, haven't you?

A. No, sir, I haven't solicited no union in this city, not in Greater Kansas City.

Q. To join your union?

A. Not at the time the ice——

Q. (Interrupting) Don't you want them to join your union?

A. Yes, sir.

Q. Why don't you go to them and solicit them instead of trying to destroy the business of the manufacturer?

A. I am not doing anything so long as I have an injunction against him.

Q. I know you are not now, but you were before you had the injunction?

A. Yes, sir.

[fol. 63] Q. And that was the understanding the members of the union had who were partners to this suit?

A. I couldn't say whether they do or not. My members do.

Q. But those who were members understand the purpose of it?

A. Yes, sir.

Q. And the affiliates of the A. F. of L. understand the purpose of it?

A. Certainly.

Q. And are cooperating with you. Your ultimate purpose was to destroy the business of the Empire Storage and Ice Company unless they quit selling to non-union men?

A. I would say I didn't mean anything in regards to destroying their business at all. My sole purpose was to organize those non-union peddlers.

Q. Haven't you solicited any of them?

A. Not since this injunction. I have in the past.

Q. While the picketing was going on, didn't you personally solicit?

A. No, sir.

Q. Before the injunction?

A. Yes.

Q. You were down there with the picket, weren't you?

A. Yes, sir.

Q. And you were on the inside of the place talking to the union men?

A. No, I was inside Mr. Wilkerson's office talking to Mr. Wilkerson is the only time I was inside.

Q. John Meyer, a tenant of the plaintiff company, as [fol. 64] A.F. of L. employees, hasn't he?

A. I understand he has.

Q. Did you have a talk to Mr. Meyer about his employees?

A. No, sir.

Q. Who is the other business agent that was down there?

A. There were several of them down there.

Q. Several of them?

A. Yes, sir.

Q. About how many of the business agents were there while the picketing was going on before the injunction?

A. There was approximately five or six, I would say. I don't recall exactly how many. They were going and coming at various times.

Q. What are the duties of the president of an organization of this sort?

A. Duties of the president?

Q. Yes.

A. Mostly, just to conduct meetings.

Q. But you are also the business agent?

A. That is right.

Q. And you have direction of the men and they obey you as to where they should work and where they should go?

A. That is correct.

Q. You were down there assisting in the picketing, were you not?

A. Yes, sir.

Q. And directing members of the union not to deliver to or receive goods from the company?

A. I don't know what you mean by "directing." I was [fol. 65] there to see that the banner was carried.

Q. That wasn't the only thing you were there for?

A. That is right, the only thing, to see the banner was carried.

Q. And that was what you went into Mr. Wilkerson's office for?

A. No, sir.

Q. What did you go in for?

A. I went in—the other representative thought that he would go inside and talk to him, and we went in and I don't think I said anything to Mr. Wilkerson about it that morning.

Q. You had talked to him on the telephone?

A. Yes, sir.

Q. And told him if he didn't do it, you were going to place pickets there and interfere with his business?

A. I said nothing about interfering with his business.

Q. You knew it would interfere with his business?

A. I thought perhaps it would.

Q. That is what you meant by calling him up and telling him he had better cooperate with you and not sell to non-union men, that is what you had in mind?

A. I had in mind for him to quit selling to non-union peddlers.

Q. Now, there are about 12 or 15 of these men you call peddlers that buy ice from the company?

A. I think there are about 25 all told. Mr. Wilkerson said 12 or 15 that loads out of that plant, but there is a place up on top of the hill on Prospect which is controlled [fol. 66] and operated by Mr. Wilkerson.

Q. Take this man who was on the stand just before you got on, by whom is he employed?

A. I presume himself.

Q. Now, who are the employees of the men who buy ice from Mr. Wilkerson?

A. Who are——

Q. Who are they working for?

A. Some of them, I don't know all of them, are working for Mr. Dunham, some of these men's names, all of these men's names were in this petition.

Q. But they belong to the union?

A. Yes, sir.

Q. I am talking about the independents that you are trying to get to join the union, who are they employed by?

A. They are employed by the man who is buying the ice, some of them, and some of them are working for themselves.

Q. I mean these men that Mr. Wilkerson sells to that are not union men?

A. They are employed by themselves.

Q. Employed by themselves. Not working for anybody except themselves?

A. That is right.

Q. Would you have any objection to Mr. Wilkerson selling ice to a restaurant under your rules?

A. I don't just understand what you mean there. Would I have any objection to him if he was driving a truck and delivered ice, yes, does that answer your question?

Q. Yes, that answers the question.
A. Yes, I would.
[fol. 67] Q. Who employes these non-union men that you are trying to force Mr. Wilkerson to help you get into the union?

Mr. Langsdale: Object to that as repetition. He says they worked for themselves.
The Court: Overruled.

By Mr. Park:

Q. They are not employees of anybody?
A. Not to my knowledge.
Q. Now, if you get one of them to join the union, what benefit would it be to that man who is not employed by anybody to sell his ice for any more?
Mr. Langsdale: Object to that as immaterial. Doesn't tend to prove or disprove any issues in this case. Certainly, we don't in this case try out the benefits of union organization.
The Court: Overruled.

By Mr. Park:

Q. Here is a man who is the owner, if he joined the union he would have to pay dues wouldn't he?
A. Yes.
Q. What are the dues he would have to pay?
A. $2.50 a month.
Q. What is *in* initiation fee?
A. That depends. We have various initiation fees. If we take them in groups, we make concessions; if we take them after their place is organized, there is a $25.00 initiation fee.
Q. And then, dues of how much a month?
A. $2.50.
[fol. 68] Q. Now, what benefit is it to a man who buys ice and sells it to belong to the union?

Mr. Langsdale: Object to that as immaterial. It doesn't——

Q. (Interrupting) What can you do for them?

Mr. Langsdale: Just a minute. Object to the question. It is not based on any pleading and certainly this court will

take judicial knowledge of the fact that there is a benefit in belonging to labor unions.

Mr. Park: I don't mean the moral benefit.

The Court: Overruled.

By Mr. Park:

Q. What I mean is, can he sell ice for any more?

A. I wouldn't say he could sell for any more. I didn't have any control of what they sell for.

Q. So, as I understand it, if he joins the union, he can't get any more for his ice than if he did not join the union?

A. I don't have anything to do with fixing the price of ice. He can sell it for any amount he wants to. I don't have anything to do with it. He can give it away if he wants to.

Q. Can he do that if he is a member of the Union?

A. He can give it away. I have nothing to do with that at all.

Mr. Langsdale: If he is a member of the union, he can [fol. 69] take part in keeping up the wages of these helpers?

The Witness: That is correct.

Mr. Langsdale: To see they get living wages and not starvation wages?

The Witness: That is correct.

Mr. Langsdale: And he can buy his ice from the City Ice Company, Kansas City Ice Company and these other places that refuse to sell to non-union peddlers?

The Witness: That is correct.

By Mr. Park:

Q. Do all non-union peddlers have helpers?

A. I couldn't answer that, but I would say that during the peak season there would be 90 to 95 per cent would have helpers.

Q. How about the man who doesn't have a helper, that buys in small quantities, and sells around from house to house?

A. Truthfully, I don't think you will find anyone on the street today who doesn't have a kid helping them on an ice truck.

Q. Their own children?

A. No, not all of them.

Q. Some of them?

A. It is possible.

Q. Give employment to their fa...lies that way?

A. Yes.

Mr. Park: I believe that is all.

Mr. Langsdale: That is all.

(Witness excused).

Mr. Park: Now, your honor, it is noon and——

[fol. 70] Mr. Langsdale: (Interrupting) The defendant rests.

Whereupon, the defendant rested its case.

Mr. Park: Well, we want to reserve the right to put another witness on.

Mr. Langsdale: I will admit anything you say in testimony.

Mr. Park: I don't care. I want to put the witness on.

The Court: You will be here at two o'clock.

Mr. Park: I don't want to inconvenience the court.

The Court: It doesn't interfere with the court. Be here at 2 o'clock gentlemen. You are now excused until 2 o'clock.

Whereupon, the Court stood at recess until 2 o'clock p.m. of said Thursday, August 8, 1948.

[fol. 71] Afternoon Session, Thursday, August 8, 1946.

Pursuant to adjournment as aforesaid, at 2 o'clock p. m. of said Thursday, August 8, 1946, Court met, present and presiding as before, and the trial continued as follows:

Mr. Park: The witness will not be here, your honor. He is a man of advanced years and his health is not good and he is afraid to come out in this heat, but there will be no dispute as to his testimony.

Mr. Langsdale: We offered to admit it this morning.

Mr. Park: Well, you were coming back anyway.

Mr. Langsdale: No, but we will admit it now if you will state it.

Mr. Park: Another matter I would like to read into the record is a list which Mr. Wilkerson has made of some of the firms that do business with his company, have union drivers, and whose business with them was interrupted.

Mr. Langsdale: Well, I will admit that those people had business with him, they had union drivers and their busi-

ness in all probability would have been interrupted, but I am not going to admit something that they can't testify to.

Mr. Park: This is the list of names.

Mr. Langsdale: Well, you can read these into the record.

Mr. Park: Mr. Wilkerson, you will have to read them [fol. 72] into the record.

Mr. Wilkerson: The Quartermaster Market, United States Government, which is the army, Campbell Soup Company——

Mr. Langsdale: Wait a minute. They have their own drivers have they not? I am not going to admit that unless you prove it.

Mr. Park: Withdraw that——

Mr. Wilkerson (Interrupting:) Just about three days back, they sent a transport truck down there to get butter out of our warehouse to go across to Kansas.

Mr. Langsdale: Who did, the Quartermaster?

Mr. Wilkerson: Yes.

Mr. Langsdale: What is it you expect to prove?

Mr. Wilkerson: I just want to put into the record the names of the larger accounts that have perishable goods in our plants bringing it in and taking it out, that can't operate in or out of our plant as long as the picket line is there.

Mr. Langsdale: I am going to object to your conclusion if you state as to the army. That isn't true. It is the rule and regulation of the truckdrivers in this community never to interfere with any truck going after or for government material. You will have to prove that by some other witness. I won't admit that. I will admit the private concerns.

Mr. Wilkerson: Campbell Soup Company who operate [fol. 73] a packing house, slaughter house in Kansas City, Kansas, constantly bringing fresh meat into our plant, as much as 100,000 pounds a day; the Liberty Truck Line Transfer Company, they have union drivers, they can't come into the plant and won't come in so long as the picket line is there; Wilson and Company, Borden's Dairy Company, Franklin Ice Cream Company, Country Club Dairy, Fred Wolferman, Incorporated; Carter Pie Company, Continental Packing Company, Milgram Food Stores, Incorporated; Loose-Wiles Biscuit Company, Bell Packing Company, Frigid Food Products Company, W. R. Perry, Los Angeles, California, Royal Meat Company, F. Angelo, and Kansas City Dressed Beef; those are just some of the companies.

W. Ralph Wilkerson, recalled as a witness on the part of the plaintiff, having been previously duly sworn, testified further as follows:

Recross-examination.

By Mr. Langsdale:

Q. All of those companies employ members of some A. F. of L. trucking union?

A. Of some union, I wouldn't be positive they are A. F. of L. They might be C.I.O.

Q. You know, of course, this picket line doesn't affect C.I.O. people because they work for you and are constantly going in and out of there, aren't they, including your own driver?

A. I don't know. C.I.O. drivers have refused to pass the picket line.

[fol. 74] Mr. Langsdale: I admit this testimony only insofar as it is to the effect that the drivers for these companies are members of the A. F. of L. unions. I don't want the implication here that they are C.I.O. because they wouldn't recognize our picket line, don't have to and won't. That is all.

Redirect examination.

By Mr. Park:

Q. I want to ask you one other question. You testified about Armour and Company?

A. Contractor, yes, I testified.

Q. What I want to ask you is something you didn't testify to. Did Meyers and Company have A. F. of L. union drivers?

A. No.

Q. What company is that.

A. Ar-tic Ice Company, Mr. Dunham is the owner of it. They have union drivers.

Q. Have you a contract to sell ice to him?

A. Yes, sir.

Q. And were you able to carry out the contract while the picketing was going on?

A. No, sir.

Q. Why?

A. Because his drivers are union drivers and they won't cross that picket line and he is a contractor.

Mr. Park: That is all.

(Witness excused.)

[fol. 75] Whereupon, the plaintiff rested its case.

Mr. Langsdale: That is all.

Whereupon, the defendant rested its case.

DEFENDANTS' REQUESTED DECLARATION OF LAW

Whereupon at the close of all the testimony in the cause, the defendants, by their counsel, requested the court to give the following Declaration of Law:

"At the close of all of the evidence in the case, the Court declares the law to be that under the pleadings, the law, and the evidence, the plaintiff is not entitled to the relief prayed for in its bill, and is not entitled to the order heretofore made in this case, and plaintiff's bill is dismissed at its cost."

"Filed August 8, 1946. Bernard T. Flannery, Clerk, by: John Thrasher, Deputy."

Which said Declaration of Law, at the close of all the testimony the Court refused to give; to which ruling and action of the Court, the defendants, by their counsel, duly excepted and still except.

JUDGMENT

Whereupon, the Court, over the objection and exception of the defendants, entered the following judgment:

"Now, on this day, this cause coming on regularly for hearing on an order on the named defendants to show cause why a temporary injunction should not issue against them enjoining them from picketing plaintiff's warehouse [fol. 76] and cold storage and ice plant in Kansas City, Missouri.

Plaintiff appears by its counsel, Guy B. Park, and the named defendants appear by their counsel, Clif Langsdale.

And now, in open Court, the parties waive a hearing on a temporary injunction and agree that the Court, upon hearing the evidence, may finally determine on the merits — the issues as to whether or not a permanent injunction should issue, as prayed in plaintiff's petition.

And now, plaintiff offers its evidence and rests; and now defendants offer their evidence and rest.

And now the Court, having seen and read the pleadings, having seen and read the briefs filed by the parties, and having seen and heard the witnesses, and now being fully advised in the premises, finds as follows:

That the named defendants herein, and each of them, are members of the Ice and Coal Drivers and Handlers Local Union 953, an unincorporated labor union and association in Kansas City, Missouri; that the defendant A. J. Jenkins is the president and business agent of said local union; that the members of said local union are so numerous that it is impractical and in all probability impossible to make all the members of said local union parties to this action; that the named defendants fairly represent said local union and its entire membership and fairly insure adequate representation of all members of said local union; and the Court accordingly finds that it has full jurisdiction and authority to enter a decree and injunction herein which will be binding on all members of said local union, whether named as defendants herein or not.

[fol. 77] And the Court further finds that all the allegations of plaintiff's petition herein are true. That all the members of said local union have entered into, and were at the time of this filing of this action, and until stopped by the restraining order of this Court, engaged in an agreement, combination and understanding to picket plaintiff's warehouse, cold storage and ice plant located at Chestnut and Guinotte Streets in Kansas City, Missouri, and thereby to prevent ingress and egress thereto and therefrom and thereby interfere with the relationship between plaintiff and its customers and in unlawful restraint of the trade of plaintiff, and for the further purpose of alienating and driving away plaintiff customers.

And the Court further finds that neither the named defendants nor any other members of said local union are now, or have been, employees of the plaintiff. That it is not the purpose of said conspirators to affect the relation-

ship between plaintiff and any of its employees, but the purpose of said conspirators is to affect adversely to plaintiff the relationship between plaintiff and its customers. That there does not here exist any labor dispute within the meaning of the law between plaintiff and its employees, or between plaintiff and any member of said local union, and that there is no labor dispute whatever involved. That said conspiracy is for an unlawful purpose, and that picketing used to carry out said purpose is also unlawful.

[fol. 78] And the Court further finds that at the time of the institution of this suit, and until stopped by the restraining order of this Court, the members of said local union were engaged in picketing plaintiff's said plant. That unless an injunction issues herein, the members of said local union will continue to picket plaintiff's said plant. That the picketing of plaintiff's said plant has resulted, and if permitted to continue will result in the drivers of many of plaintiff's customers refusing to pass said picket line and enter plaintiff's said premises, either to bring goods thereto or take goods therefrom. That by reason thereof delays in delivery of perishable goods and other goods have resulted in great loss and damage to plaintiff and plaintiff's customers.

That because of said picketing many of plaintiff's customers have ceased to do business with plaintiff, and if said picketing is permitted to continue, many more of plaintiff's customers will, in the future, cease to do business with plaintiff. That it is impossible now to ascertain how much money and business the plaintiff has lost by reason of said picketing, and plaintiff's damages are impossible of ascertainment. That if such picketing is permitted to continue, it will be impossible to ascertain plaintiff's damage in the future. That by reason thereof plaintiff has suffered, and if said picketing is continued, will suffer great and irreparable damages as a direct result thereof. That plaintiff is without any adequate remedy at law.

[fol. 79] The Court further finds that plaintiff is entitled to the issue of permanent injunction against all members of said local labor union as prayed in Plaintiff's petition.

It is thereof ordered, adjudged and decreed that the named defendants and all other members of the Ice and Coal Drivers and Handlers Local Union No. 953, an unincorporated labor union and association in Kansas City,

Missouri, be, and they are hereby permanently enjoined for the reasons aforesaid from placing pickets, or picketing, around and about the buildings of plaintiff described above, and used by plaintiff in the cold storage, warehouse and ice business in Kansas City, Missouri, and the costs of this action are assessed against the named defendants, for which let execution issue. (Entry Furnished.)"

IN CIRCUIT COURT OF JACKSON COUNTY

DEFENDANTS' MOTION FOR A NEW TRIAL—Filed August 9, 1946

[fol. 80] Now come the defendants herein and respectfully move the Court to set aside the judgment entry heretofore herein entered in favor of the plaintiff, and to grant defendants a new trial on the following grounds, to-wit:

1. The Court erred in refusing to give defendants requested declaration of law at the close of all the evidence in the case to the effect that under the pleadings, the law and the evidence, the plaintiff is not entitled to the relief prayed for in the Bill.

2. The Court erred as a matter of law in finding, under the evidence of the case, that there was no labor dispute within the meaning of the law involved in the case.

3. For the reason that said judgment is not supported or legally justified by any substantial evidence in the case; that is to say that even viewing the evidence in the light most favorable to the plaintiff there is no legal basis for a judgment in favor of the plaintiff.

4. This being an equity case the judgment is against the great weight of the evidence and constitutes an abuse of judicial discretion subject to review by the Appellate Court.

5. The Court erred in denying to the defendants the protection afforded them by virtue of the First and Fourteenth Amendments to the Constitution of the United States, and by paragraphs 8 and 29 of Article I of the Constitution of [fol. 81] the State of Missouri, duly invoked in defendants' answer, in that said judgment denies to said defendants the freedom of speech and of assembly, and deprives them of their property rights without due process of law.

6. The Court erred in finding that the conduct of the defendants constituted an unlawful restraint of trade under the Missouri Statutes as pleaded in Plaintiff's petition.

7. The Court erred in entering a judgment for the plaintiff whereas said judgment under the law and undisputed facts in the case should have been in favor of defendants.

[File endorsement omitted]

IN CIRCUIT COURT OF JACKSON COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL

Afterward, and on said Friday, August 9, 1946, the same being the 74th day of the regular May, 1946, Term of said court, defendants' motion for new trial was by the court, taken up, duly heard and was by the court overruled.

(To which action and ruling of the court, the defendants, and each of them, at the time duly excepted and still except.)

[fol. 82] IN CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL—Filed August 9, 1946

Now come defendants and each of them through their duly authorized attorney of record and agent, and file this notice of appeal to the Supreme Court of the State of Missouri from the final judgment and decree heretofore herein by the court made and entered.

Memorandum of the Clerk

I have this day mailed by registered mail a copy of the within notice of appeal to each of the following persons at the address stated: Guy B. Park, Esq., Attorney-at-law, 1608 Federal Reserve Bank Building, Kansas City 6, Missouri.

I have also mailed a copy of the notice of appeal to the Clerk of the Supreme Court of Missouri, together with the docket fee deposited by appellant.

Dated August 9, 1946.

Bernard T. Flannery, Circuit Clerk, by Maxine Johnston, Deputy Clerk. (Seal.)

Attached to said notice of appeal is "return receipt of the United States Post Office Department, dated August 12, 1946, 5:30 p. m., addressed to B. T. Flannery, Circuit Clerk, [fol. 83] 306 County Court House, Kansas City, 6, Missouri, signed for Guy B. Park; by Alma L. Campbell."

Whereupon, said defendants' appeal bond was by the court fixed in the appeal sum of $100.00, and said defendants were by the court given twenty (20) days from this date within which time to file said appeal bond, and said defendants were by the court given time to file their Transcript of the Record on Appeal as fixed by law.

Wherefore, the defendants, by their counsel, pray the Court to settle and allow this, their Transcript of Record on Appeal, to all and singular the acts, rulings and orders of the Court in the premises; and that the same be signed, sealed, allowed and made a part of the record herein.

Wherefore, the plaintiff and defendants, agreed that the foregoing is a full and complete Transcript of the Record on Appeal in this cause, including exceptions to all and singular acts, rulings and orders of the Court in the premises.

Guy B. Park, Attorney for Plaintiff; Clif Langsdale, Attorney for Defendants.

[fol. 84] Order Settling Transcript of Record

Now, Therefore, the Court, being fully advised in the premises, doth find the foregoing to be a correct Transcript of the Record on Appeal taken and saved on behalf of the Defendants, Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry and A. J. Jenkins, herein, and doth now sign the same and doth order that the same may be filed and made a part of the record in this cause.

Given under the hand of the Judge of said Court before whom said proceedings were had, on this 10th day of September, 1946.

Thomas J. Seehorn, Judge of the Circuit Court, Jackson County, Missouri, Division Number Three.

[fols. 85-86] Clerks' Certificates to foregoing transcript omitted in printing.

[fol. 87] [File endorsement omitted.]

IN THE SUPREME COURT OF MISSOURI

Sitting En Banc

No. 40,099

EMPIRE STORAGE AND ICE COMPANY, a Corporation, Appellee,

v.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, A. J. Jenkins, Individually and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, an Unincorporated Labor Union, Appellants

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed July 8, 1948

To the Honorable the Clerk of the Supreme Court of the State of Missouri:

You are requested properly to certify the following matters and things of record in the above entitled cause for filing with the Clerk of the Supreme Court of the United States, upon appeal taken from the Supreme Court of Missouri, to said Court.

1. This Precipe.

2. The Transcript of Record of the proceedings in the lower court, filed in the Supreme Court.

3. Argument and submission of above entitled cause to the Supreme Court, Division 1.

4. The decision and judgment of the Supreme Court, Division 1, affirming the judgment of the lower court, with opinion filed.

Note: The opinion by Division No. 1 of the Supreme Court is literally the same as the opinion later delivered by the Supreme Court en banc on March 8, 1948. It is suggested therefore that it is unnecessary to certify both opinions, it being sufficient if the opinion en banc is certified. We suggest the following form:

[fol. 88] The opinion by Division 1 of the Supreme Court of Missouri is literally the same as the opinion later delivered by the Supreme Court en banc, on March 8, 1948, copy of which is hereinafter certified.

5. Filing of motion for rehearing in Division 1 and also filing of motion to transfer said cause to the Court en banc.

6. Action of the Court in overruling the motion for a rehearing and in sustaining the motion to transfer the cause to the Court en banc.

7. Submission of the cause by the parties to the Cour- en banc.

8. Judgment and decision by the Supreme Court en banc, including certified copy of the opinion by that court then filed.

9. Filing by appellants of motion for a rehearing upon the judgment and opinion of the court en banc.

10. Action by the court en banc in overruling said motion for a rehearing.

11. The court's action in sustaining appellants, motion to stay the mandate for ninety days from April 12, 1948.

12. Petition for appeal to the Supreme Court of the United States, with record entry of filing.

13. Appellants' Bond on Appeal and the approval, with record entry of filing.

14. Appellants' assignments of error.

15. Appellants' general statement.

16. Appellants' jurisdictional statement.

17. Citation.

18. Order allowing appeal.

Clif Langsdale, Clyde Taylor, Attorneys for Appellants, 922 Scarritt Building, Kansas City, Missouri.

[fol. 89] UNITED STATES OF AMERICA,
State of Missouri, ss:

Be it Remembered, that, heretofore, to-wit, on the 10th day of October 1946, there was filed in the office of the Clerk of the Supreme Court of the State of Missouri, in a cause entitled Empire Storage and Ice Company, a corporation, Respondent, versus Joseph Giboney et al., Appellants, No. 40099, a transcript of record.

[fol. 90] IN SUPREME COURT OF MISSOURI

[Title omitted]

ARGUMENT AND SUBMISSION—April 23, 1947

Come now the parties, by their respective attorneys, and after arguments herein submit the above-entitled cause to the Court.

IN SUPREME COURT OF MISSOURI

40099

EMPIRE STORAGE AND ICE COMPANY, a Corporation,
Respondent

vs.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, A. J. Jenkins, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union, No. 953, Appellants

Appeal from the Circuit Court of Jackson County

JUDGMENT—September 8, 1947

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force

and effect; and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed)

(This opinion by Division One is literally the same as the opinion later delivered by the Court en banc on March 8, 1948 and is shown on Page 93 of this transcript)

[fol. 91] IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—September 22, 1947

Come now the appellants, by attorney, and file their motion for a rehearing in the above entitled cause, with service shown.

Come also the appellants, by attorney, and file a motion to transfer said cause to the Court en banc, with service shown.

IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING AND SUSTAINING MOTION TO TRANSFER TO COURT EN BANC—October 13, 1947

Now at this day, the Court having seen and fully considered the motion of the appellants for a rehearing in the above-entitled cause doth order that said motion be, and the same is hereby overruled.

And now at this day, the Court having seen and fully considered the motion of the appellants to transfer this cause to the Court en Banc, doth order that said motion be, and the same is hereby sustained, and said cause is ordered transferred to the Court en Banc.

[fol. 92] IN SUPREME COURT OF MISSOURI

En Banc

SUBMISSION—February 2, 1948

Come now the parties, by their respective attorneys, and submit this cause to the court on briefs.

IN SUPREME COURT OF MISSOURI

En Banc

40099

EMPIRE STORAGE AND ICE COMPANY, a Corporation, Respondent

vs.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, A. J. Jenkins, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, Appellants

Appeal from the Circuit Court of Jackson County

JUDGMENT—March 8, 1948

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondent recover against the said appellants its costs and charges herein expended and have therefor execution. (Opinion filed)

Which opinion by the Court en banc is in words and figures following, to-wit:

[fol. 93] IN THE SUPREME COURT OF MISSOURI

En Banc

January Session, 1948

No. 40,099

EMPIRE STORAGE AND ICE COMPANY, a Corporation, Respondent,

v.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, A. J. Jenkins, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, Appellants

Appeal from the Circuit Court of Jackson County

OPINION

Plaintiff corporation maintains a cold storage public warehouse where it stores perishable foodstuffs and other perishable merchandise owned by its customers. It also manufactures and sells ice which constitutes from fifteen to twenty per cent of its entire business. Plaintiff's employees are completely unionized by both the C. I. O. and the A. F. or L. The ice which it sells is a union product, not a non-union product. There is no labor dispute of any kind between plaintiff and its employees.

Defendants are members and officers of a labor union, the Ice and Coal Drivers and Handlers Local Union No. 953, which is affiliated with the American Federation of Labor. Its membership is composed of truck drivers for soft drink manufacturers, ice, and coal dealers. The membership also includes individual ice peddlers who operate their own trucks in carrying on their own businesses of selling ice at retail. About eighty per cent of the two hundred ice peddlers doing business in Kansas City are members of the union. The defendants engaged upon a campaign for the [fol. 94] purpose of unionizing the remainder. One of the reasons was to establish a minimum wage of $4.00 per day for any helper who may be employed by a peddler. The union has obtained agreements from all the other manu-

facturers and distributors of ice in Kansas City under which they are bound not to sell ice to non-union peddlers.

For over twenty years plaintiff has been selling ice at wholesale to individual ice peddlers. The ice peddlers are not employees of plaintiff and never have been. There is no evidence that plaintiff has ever engaged in distributing ice to customers at retail. Sales of ice to peddlers are completed at plaintiff's plant at wholesale rates. Thereafter the peddlers resell the ice at retail to their own customers without being subject to any supervision or control by plaintiff. So far as plaintiff is concerned the peddlers are independent contractors. Only twelve to fifteen peddlers are regular customers of plaintiff.

Defendant Jenkins, President of the Local Union, demanded that plaintiff stop selling ice to non-union peddlers, under the threat he would use means at his disposal to enforce his demand. Plaintiff refused his demand and a picket line was placed at its plant with the result that all deliveries to and from the plant by union drivers were halted. Drivers hauling perishable foodstuffs to plaintiff's plant could not deliver them for storage, and tenants of the storage house could not obtain their foodstuffs stored there. There was no violence. About eighty-five per cent of the plaintiff's storage business was stopped by the picket line. Defendants insist the only purpose of the picket line was to compel plaintiff to stop selling ice to non-union peddlers, and to obtain such result they had to interfere with plaintiff's business.

Plaintiff brought suit to restrain the picketing on the ground it was pursuant to an unlawful combination in restraint of trade to prevent plaintiff from carrying on its business including the sale of ice, and therefore the picketing was unlawful. Defendants answered they had the right to picket under the freedom of speech provisions of the [fol. 95] Federal and State Constitutions.

After a hearing the trial court found defendants were unlawfully conspiring in restraint of trade, the picketing was for an unlawful purpose, and there was no labor dispute between plaintiff and its employees or between plaintiff and defendants. The court permanently enjoined defendants from picketing plaintiff's plant. Defendants have appealed.

Section 8301, R. S. 1939, Mo. RSA of the article of our statutes "Pools, Trusts, Conspiracies and Discriminations".

forbids a combination in restraint of trade and declares it a conspiracy, as follows:

> "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing brought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article."

The court en banc has recently held this statute to apply to a situation similar to the one we have here in the case of Rogers v. Poteet, — Mo. —, 199 S. W. (2d) 378, and that decision is controlling here and rules this case.

In the Rogers case members of the Milk Drivers and Dairy Employees Local Union combined together to prevent rural milk haulers, independent contractors who were not members of the union, from delivering milk to the dairies' milk processing plants in Jackson County. The court held such combination was "a confederation in restraint of competition in the transportation of fresh fluid milk to all the milk processing plants in that area", pointing out that Section 8301 expressly forbids a combination in restraint of competition in the transportation of commodities.

On the same issues raised here as to the constitutional rights of the defendants to free speech the court said: "In [fol. 96] other words, outside of the fundamental guaranties in the Bills of Rights in the Federal and State Constitutions, the question of the legality of such combinations is one of statutory law, not constitutional law." The court held the conspiracy between the union members violated Section 8301 and the common law, and was not protected by the First and Fourteenth Amendments of the Federal Constitution, and Sections 8, 9 and 10, Article I of the Constitution of Missouri, 1945.

The instant case appears to be even a stronger case than the Rogers case. The plaintiff in that case was an individual hauler whom the union was trying to force into its ranks. But the plaintiff here is a business establishment which is being threatened with the alternative of either ceasing to

furnish ice to some of its customers or having its business destroyed through a local transportation combination, substantially denying delivery service to or from its plant in connection with its principal business activity which is storage, not ice selling.

Following the principal laid down in the Rogers case we must hold here that the picketing is unlawful because a combination of union truck drivers involving most of the delivery service transportation in Kansas City comes equally within the condemnation of Section 8301 when it abandons its legitimate sphere of collective bargaining and other properly related dealings with its employers, and seeks to dictate the terms under which an establishment will be either permitted or denied local transportation service.

The defendants have used their local transportation combination improperly to threaten and to produce injury and damage through a boycott of plaintiff's business, and incidentally to injure the business of citizens who are regular customers of its cold storage warehouse, by cutting off supplies to and from its customers. This misuse of their power over local transportation is all the more aggravated by the fact plaintiff's plant is fully unionized and there is no labor dispute between plaintiff and its employees, and there is no labor dispute as the term has been construed by court decisions between plaintiff and defendants, nor even any lawful labor grievance between plaintiff and defendants.

[fol. 97] The admitted purpose of defendant's picketing is clearly in violation of Section 8301. Defendant Jenkins testified his union had made agreements with the other ice companies of Kansas City under which the companies agreed not to sell ice to non-union peddlers. By their picketing defendants were attempting to force plaintiff to become a party to such combination. A combination for the purpose of refusing to sell to a certain person or persons is in direct violation of Section 8301. Our courts have so held in a number of cases. Reisenbichler v. Marquette Cement Co., 241 No. 744, 108 S.W. (2d) 343; Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S.W. 691; Finck v. Schneider Granite Co., 187 Mo. 244, 86 S.W. 213; State ex rel. v. Peoples Ice Co., 246 Mo. 168, 151 S.W. 161; Dietrich v. Cape Brewery & Ice Co., 315 Mo. 507, 268 S.W. 38.

In the latter case we said: "Argument is advanced, founded upon the right of a person engaged in a business

private in character, to buy from whomsoever he pleases, to sell to whomsoever he will, or to refuse to sell to a particular person. The right does not extend to the allowance of an agreement and concerted action thereunder of such person with others similarly engaged, in the accomplishment of a common design, to destroy the business of another, or to the making of an agreement forbidden by law, and concerted action thereunder, inflicting an injury upon the public. What the defendants could have done severally, by independent action, is essentially different from what they might do collectively, pursuant to an agreement between themselves and by concerted action thereunder." The case of Shaltupsky v. Brown Shoe Co., 350 Mo. 831, 168 S.W. (2d) 1083 is not applicable under the facts or the issues.

Inasmuch as defendants were attempting through its picket line to force plaintiff into a combination which had the concerted purpose of preventing the sale of ice to non-union peddlers, and thus require it to make unlawful discrimination in its sale of ice, it follows that the purpose of the picketing was unlawful.

[fol. 98] Picketing for unlawful purposes may properly be enjoined. See Fred Wolferman, Inc. v. Root et al., decided today by the court en banc, and the cases cited therein.

Defendants in this case cite the same decisions of the Supreme Court of the United States in support of their constitutional rights under which they may picket as were cited in the Wolferman case. We refer to that decision for the discussion of these cases and repeat here that they are distinguishable on the facts. We summarized that discussion by stating that none of such cases authorized picketing to induce an employer to do an unlawful act condemned by statute and contrary to public policy, under the constitutional guaranty of freedom of speech.

While the case of Bakery & Pastry Drivers, etc. v. Wohl, 315 U. S. 769 dealt with peddlers, described therein as "venders", of bakery goods it is not apposite here on the issues. The court found no unlawful conduct in that case. In an attempt to unionize the peddlers both the baking companies which supplied the peddlers and customers of the peddlers, in some instances, were picketed. No baking companies were parties to that case. The trial court found that no customers were turned away from the baking com-

panies by reason of the picketing. It also appeared that the baking companies which were then operating delivery routes through employee drivers had notified the unions that at the expiration of their contracts they would no longer employ drivers but would permit the drivers to continue to distribute their baked goods as peddlers. The state court had enjoined the picketing upon the complaint of some of the peddlers on the ground no labor dispute was involved within the meaning of the state statute. Of this the Supreme Court said: "Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive."

In Milk Wagon Drivers Union, etc. v. Lake Valley Farm Products, Inc., 311 U. S. 91 the union was attempting to organize the peddlers of milk, but as we read the case the [fol. 99] picketing which was held lawful was confined to the places of business of the peddlers' customers, and the dairies which supplied the peddlers were not picketed. In that case too, the court observed that increasing use of peddlers to distribute milk caused decreased employment of union milk drivers. It also appears in Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, 312 U. S. 287, where picketing was enjoined because of violence, that the picketing was confined to peddlers' customers.

In Carpenters and Joiners Union, etc. v. Ritter's Cafe, 315 U. S. 722, the court upheld the injunction against picketing which a Texas Court had ordered on the ground the picketing constituted a violation of the state anti-trust law. However, the Supreme Court's opinion did not discuss the issue on the anti-trust law, but based its decision on the theory that a state may confine the sphere of communication by picketing to that directly related to the dispute.

The decree in this case forbidding picketing by defendants forbade only the picketing about plaintiff's premises. We affirm the decree. There is nothing in the decree which restrains defendants from informing the public of any labor dispute they may have with the peddlers by any lawful means of dissemination of information, including picketing, wherever the same may be proper. Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions.

Complaint is made that the petition failed to allege an unlawful combination in restraint of trade such a prescribed by Section 8301, and plaintiff failed to prove one. The court found after hearing evidence that defendants had combined in unlawful restraint of trade. We find the proof of such an unlawful combination was sufficient, and as shown above the combination was conceded by defendants as to the violation of the statute in attempting to prevent the sale of ice to non-union peddlers. As to the sufficiency of the [fol. 100] petition we find its allegations are somewhat general and well might have been stated in greater particularity. But defendants waived their right to compel this by timely motion. Hamilton v. Linn, —— Mo. ——, 200 S.W. (2d) 69. However, even in its general terms we find the petition sufficiently alleges an unlawful combination in restraint of trade such as Section 8301 condemns.

For the reasons stated, the judgment is *affirmed*.

James M. Douglas, Presiding Judge.

All concur.

[fol. 101] In Supreme Court of Missouri

[Title omitted]

Minute Entry—March 16, 1948

Come now the appellants, by attorney, and file herein their motion for a rehearing, with service, in the above entitled cause.

In Supreme Court of Missouri

[Title omitted]

Order Overruling Motion for Rehearing—April 12, 1948

Now at this day, the Court having seen and fully considered appellants' motion for a rehearing filed in the above entitled cause, doth order that said motion be, and the same is hereby overruled.

[fol. 102] IN SUPREME COURT OF MISSOURI

[Title omitted]

ORDER STAYING MANDATE—April 20, 1948

Come now the appellants, by attorney, and file and present to the Court their motion to stay the mandate in the above entitled cause, which motion is by the Court examined and sustained; and the mandate is stayed for Ninety days from April 12th 1948.

IN SUPREME COURT OF MISSOURI

[Title omitted]

MINUTE ENTRY—July 8, 1948

Come now the appellants, by attorney, and file herein their petition for appeal, assignment of errors, Judicial Statement and Pr-ecipe for transcript in the above entitled cause.

[fol. 103] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

Sitting En Banc

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT EN BANC OF THE STATE OF MISSOURI TO THE SUPREME COURT OF THE UNITED STATES—Filed July 8, 1948

To the Chief Justice of the Supreme Court of Missouri en banc:

Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry, A. J. Jenkins, individually and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, an unincorporated labor union, affiliated with American Federation of Labor, your petitioners, respectfully show:

1. The petitioners are the appellants in the above entitled cause.

2. The above named appellee, Empire Storage and Ice Company, a corporation, began this suit on July 8, 1946, by filing a petition in the Circuit Court of Jackson County, Missouri, at Kansas City, praying for a temporary and upon final hearing, a final injunction against appellants, restraining and enjoining them from placing a picket or pickets around and about the buildings of appellee used in cold storage warehouse and ice business in Kansas City, Missouri.

[fol. 104] Judgment was therein rendered by the Circuit Court of Jackson County, Missouri, in favor of appellee, granting final injunction as in appellee's petition prayed.

3. An appeal from said judgment in said Circuit Court was duly taken by appellants to the Supreme Court of Missouri, which said Court, sitting en banc, was the highest court of the state in which a decision in this cause could be had. Said court of final resort did, on March 8, 1948, affirm said judgment of the Circuit Court of Jackson County, Missouri.

4. Thereafter and on March 16, 1948, appellants in due time and in accord with the rules of the Supreme Court of Missouri filed their motion for rehearing, which said motion was by the Court entertained, and on April 12, 1948, overruled. Thereupon said judgment became final, so far as Missouri jurisprudence was concerned, i.e. on April 12, 1948.

5. This petition for appeal is duly submitted and presented to the Court and the Chief Justice thereof within three months from the date on which said motion for rehearing was, as aforesaid, by the Court overruled, and the judgment became final.

6. In this suit there was and is drawn in question the validity of a statute of the State of Missouri on the ground of said statute's being repugnant to the Constitution of the United States and the decision was in favor of its validity, all as herein further specified. The statute involved is:

7. Section 8301, Revised Statutes of the State of Missouri 1939, which said section is entitled "Pools, Trusts, Conspiracies and Discriminations," and is as follows:

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement,

combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in the state or any article or thing bought or sold, whatsoever, shall be deemed and adjudged guilty of a conspiracy in re- [fol. 105] straint of trade and shall be punished as provided in said article."

The Missouri statute referred to in Section 8301 as providing the punishment for violation thereof is Section 8305 of Revised Statute of the State of Missouri, 1939, as follows:

"Any person violating any of the provisions of this article, or who shall do any act prohibited or declared unlawful by the provisions of this article, shall be adjudged guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment."

8. The validity of said statute so drawn in question was the validity thereof as its meaning was construed and applied by the Supreme Court in this case, which construction as made by the Supreme Court was that said section prohibited and made unlawful and felonious, peaceable picketing by a labor union to induce and persuade the appellee as a manufacturer of ice from selling ice to ice peddlers who were not members of the union so picketing. The meaning, scope and effect of such Missouri statute in this case is the statute as construed and applied by the Supreme Court of Missouri, and it is the validity of said statute as so construed and applied by the Supreme Court that is here drawn into question against the contention of appellants that said statute so construed and applied is in violation of the Constitution of the United States and particularly Amendments I and XIV thereof. All these matters and things are amplified and specified in the Assignment of Errors herewith filed by appellants in this cause.

Wherefore, petitioners pray for the allowance of an appeal from said Supreme Court of the State of Missouri

en banc to the Supreme Court of the United States in order that the decision of the said Supreme Court of the State of Missouri may be examined and reversed, and also pray that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the [fol. 106] Supreme Court of the State of Missouri may be sent to the Supreme Court of the United States as provided by law and particularly as provided by Title 28, Section 344, U. S. C. A. Judicial Code, Section 225.

The errors upon which your petitioners claim to be entitled to an appeal are those above indicated and more fully set out in the Assignment of Errors filed herewith.

Dated 7th day of July, 1948.

Clif Langsdale, Clyde Taylor, Attorneys for petitioner and proposed appellants.

Address of Attorneys is 922 Scarritt Building, Kansas City, Missouri.

[fols. 107-108] Bond on Appeal for $500.00 approved and filed July 9, 1948. Omitted in printing.

[fol. 109] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

En Banc

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 8, 1948

The Supreme Court of Missouri en banc erred in its final judgment in the following particulars, to-wit:

I

The Supreme Court of Missouri erred in holding that Section 8301 of Missouri Revised Statutes, Annotated, Volume 18, Section 8301, Page 516, was valid and not repugnant to Amendment One of the Constitution of the United States, the protection of which was timely and properly invoked by appellants; erred in holding that said Statute, so construed, rendered peaceable picketing by a labor union

in a labor dispute for a lawful purpose, unlawful, wherever such picketing resulted in restraint of trade or lessened competition; erred in holding that, under said Statute, enjoining such picketing did not abridge appellants' constitutional right of freedom of speech and of press under Amendment One, the protection of which was so invoked by appellants.

II

Prefatory to Assignment of Errors II:

Where the object (purpose) of a Labor Union in a labor dispute is lawful, peaceable picketing is an exercise of constitutional freedom of speech and of press; such freedom may not be abridged on the ground that such picketing incidentally results in lessened competition or restraint of trade, nor may it be abridged upon any other ground that falls short of clear and present danger to the public.

[fol. 110] II

The State Court erred in holding that said Section 8301 was constitutionally valid and erred in issuing its final injunction prohibiting the picketing here involved pursuant to the divisions of said Statute, as by the Court construed, for the reason following:

There was here a labor dispute, notwithstanding there was no controversy between Empire and its immediate employees.

The sole object and purpose of the Union was lawful, that is, it was to increase its membership by inducing non-union Peddlers to become union Peddlers and to establish a minimum wage for their helpers.

The peaceable picketing was the exercise of freedom of speech and of press.

Restraint of trade and lessened competition, if any, was not the object or purpose of the Union but it was the incidental, casual, fortuitous result of the exercise of the constitutional right of freedom of speech and of press by the Union.

There was present no clear and present danger to the public, that would justify abridgment of what would otherwise be exercise of freedom of speech and of press, as exemplified by peaceable picketing.

In connection with this Assignment of Error attention is directed that whether there be clear and present danger to

the public justifying abridgment of freedom of speech, is a question of constitutional law for the Supreme Court of the United States and not a question of fact for the Supreme Court of the State.

III

The State Supreme Court erred in failing to hold that said Section 8301, as construed and applied in this case, was repugnant to Amendment One to the Constitution of the United States and was invalid; erred in failing to hold that peaceable picketing by a labor union in a labor dispute for a [fol. 111] lawful purpose, was the exercise of their constitutional right of freedom of speech and of press, without regard to whether such picketing resulted incidentally, casually and fortuitously in restraint of trade or lessened competition; the Court erred in failing to hold that enjoining such picketing under said Statute, so construed, would abridge appellants' constitutional right of freedom of speech and of press under said Amendment One.

IV

The State Court erred in holding that where peaceable picketing by a labor union in a labor dispute for a lawful purpose comes in conflict with a State Statute prohibiting a combination, confederation or understanding in restraint of trade or competition, then the Statute (as the Court held) prevails and under such Statute the labor union and its members could lawfully be enjoined from such picketing.

V

Prefatory to Assignment of Error No. V

Where there is conflict between the police power of the State to prohibit acts in restraint of trade or competition on the one hand and the asserted constitutional right of a labor union in a labor dispute to peaceably picket in furtherance of a lawful object on the other hand, it presents a question of constitutional law for decision by the Supreme Court of the United States. Here is has been held by the State Court that peaceable picketing for the lawful object of increasing membership in a union and establishing a minimum wage, becomes unlawful and enjoinable if even the casual, incidental or fortuitous result thereof is to restrain trade

or lessen competition. Here the primary object of the picketing was to increase the membership of the union and to induce non-union Peddlers to become union Peddlers and to establish a minimum wage. The fact that such picketing could or did result in lessened competition and restraint of trade was an incidental, casual and fortuitous result thereof and not a primary result.

[fol. 112] V

The State Court erred in holding that such incidental casual and fortuitous result justified an injunction abridging freedom of speech and of the press as exemplified by peaceable picketing that otherwise would be unlawful.

Clif Langsdale, Clyde Taylor, Attorneys for Appellants.

[fol. 113] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI EN BANC

No. 40,099

[Title omitted]

GENERAL STATEMENT—Filed July 8, 1948

A brief statement of the essentials of the litigation here involved is made by way of preface to the end that the Assignment of Errors and the Jurisdictional Statement may be more readily understood. While not a part of either the Assignment of Errors or Jurisdictional Statement, it is asked that it be considered in connection therewith.

Nomenclature

Empire Storage and Ice Company, Plaintiff and Appellee, is herein sometimes called Empire.

Ice and Coal Drivers and Handlers Local Union 953, affiliated with American Federation of Labor, and individual members and representatives thereof, Defendants and Appellants, are collectively called The Union.

Those who buy ice wholesale from Empire and other ice companies and sell and deliver the same at retail are called Peddlars.

There are two hundred Ice Peddlars doing business in Kansas City, Missouri, eighty percent of whom are members of The Union. The Union engaged in a campaign to induce the remaining Peddlars to join The Union. One purpose of the campaign was to establish a minimum wage of four dollars ($4.00) per day for a helper employed by a Peddlar. The Union had obtained the cooperation of all ice manufacturers and wholesale distributors of ice in Kansas City except Empire. Such other ice manufacturers would not sell ice to non-union Peddlars. Defendants being unable, after negotiations, to induce Empire to refrain from selling ice to non-union Peddlars placed a picket line at Empire's plant.

[fol. 114] There was no violence or disturbance of the peace, mass picketing or physical interference with ingress or egress from plaintiff's plant.

The sole, ultimate purpose of the picket line was to induce non-union Peddlars to join The Union.

Empire brought suit to restrain the picketing on the ground that it was pursuant to an unlawful conspiracy and combination in restraint of trade in violation of Section 8301 of the Missouri Statutes of 1939, and hence for an unlawful object. Defendants, at first opportunity, invoked their constitutional rights of freedom of assembly, freedom of speech and freedom of the press under Amendment 1 of the Constitution of the United States. Such invocation of constitutional rights was preserved throughout all proceedings in the State Court.

Defendants also asserted throughout the *proceedings* that if said Section 8301 (prohibiting pools, trusts and conspiracies in restraint of trade, see marginal note) was by the court made applicable to this situation then said Statute, so construed, was in violation of defendants' constitutional rights invoked as aforesaid.

The sole ground upon which it was asserted that the object of the picketing was unlawful was that it was in violation of said Section of the Statute.

That is to say it was not contended, the proof was all to the contrary, that the picketing was unlawful for any other reason.

The court of first instance and the Supreme Court of the State adjudged that said Section 8301 was applicable to this situation and was decisive of the issues framed herein; that the conduct of the defendants was in violation of said

Statute and that said Statute so construed and applied was a valid Statute and was not an invasion of the constitutional rights of the defendants so invoked by them.

Hence, here we have a final judgment in a suit in the highest court of the State of Missouri in which a decision [fol. 115] in the said suit could be had, and where there was drawn in the question of the validity of a Missouri Statute on the ground of its being repugnant to the Constitution of the United States and where the decision is in favor of the validity of such Statute.

The Missouri Statute involved is as follows:

> "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in the state or any article or thing bought or sold, whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade and shall be punished as provided in said article."

The Missouri statute referred to in Section 8301 as providing the punishment for violation thereof is Section 8305 of Revised Statute of the State of Missouri, 1939, as follows:

> "Any person violating any of the provisions of this article, or who shall do any act prohibited or declared unlawful by the provisions of this article, shall be adjudged guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year, or by fine of not less than five hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment."

Clif Langsdale, Clyde Taylor, Attorneys for Appellants.

[fol. 116] Citation in usual form, filed July 9, 1948, omitted in printing.

[fol. 117] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

SITTING EN BANC

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed July 9, 1948

The petition of the above named appellants, in the above entitled cause, for an appeal therein to the Supreme Court of the United States, from the Supreme Court of the State of Missouri, en banc, and the Assignment of Errors and Statement as to Jurisdiction filed therewith, having been presented and considered:

It is ordered: That an appeal be, and it is hereby, allowed to the Appellants to the Supreme Court of the United States from the Supreme Court of the State of Missouri en banc, as prayed in said petition, and that the Clerk of the Supreme Court of Missouri shall prepare and certify a transcript of the record and proceedings in the above entitled cause, which shall be designated by praecipe filed with him by any of the parties, and transmit the same to the Supreme Court of the United States within thirty days from the date hereof.

It is further ordered: That the appellants do execute to the respondent their bond with surety, which is now approved by the undersigned in the sum of Five Hundred ($500.00) Dollars, conditioned according to law.

W. A. Leedy, Jr., Chief Justice of the Supreme Court of Missouri En Banc.

Dated: July 9, 1948.

[fol. 118] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 119] IN THE SUPREME COURT OF THE UNITED STATES

DEFINITE STATEMENT OF THE POINTS ON WHICH APPELLANTS INTEND TO RELY—Filed July 29, 1948

Appellants filed in the State Court their Assignment of Errors, which document has been certified by the Clerk of the State Court and has been filed as a part of the record in this Court. Such Assignment, to the extent that counsel were able to do so, was prepared with studied brevity and confined to the errors and points to be relied upon considered essential. Such Assignments are adopted as the statement of points on which Appellants intend to rely and the same is presented for that purpose. For convenience of reference a copy of such Assignment is hereto attached and made a part hereof.

Clif Langsdale, Clyde Taylor, Attorneys for Appellants.

Service acknowledged this 27th day of July; 1948.

(S.) Richard K. Phelps, Jerry T. Duggan, Attorney-for Appellee.

[fols. 120-123] ASSIGNMENT OF ERRORS OMITTED IN PRINTING

[fol. 124] IN THE SUPREME COURT OF THE UNITED STATES

APPELLANT'S DESIGNATION OF THE PARTS OF THE RECORD THOUGHT BY APPELLANTS TO BE NECESSARY FOR THE CONSIDERATION OF THE CAUSE AND DESIGNATED TO BE PRINTED —Filed July 29, 1948

Counsel for Appellants conceive that the entire record as certified by the Clerk of the State Court is necessary for consideration of the cause and hence request Clerk of the Supreme Court of the United States to print all thereof, under the provisions of paragraph 9 of Rule 13.

Clif Langsdale, Clyde Taylor, Attorneys for Appellants.

Service acknowledged this 27 day of July, 1948.

Richard K. Phelps, Jerry T. Duggan, Attorney- for Appellee.

[fol. 124a] [File endorsement omitted]

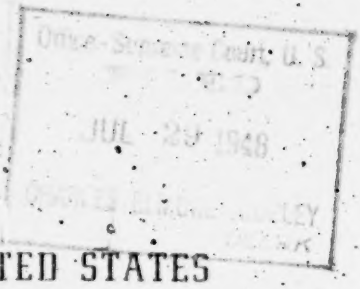
[fol. 125] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 11, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 53,184. Missouri, Supreme Court, Term No. 182. Joseph Giboney, Harold Hackell, Paul Mandalia, et al., Appellants, vs. Empire Storage and Ice Company. Filed July 29 1948. Term No. 182 O.T. 1948.

(8954)



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 182

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA,

Appellants,

vs.

EMPIRE STORAGE AND ICE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT AS TO JURISDICTION

CLIF LANGSDALE,
CLYDE TAYLOR,
Counsel for Appellants.

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IN THE SUPREME COURT OF MISSOURI

EN BANC

APRIL SESSION, 1948

No. 40,099

EMPIRE STORAGE AND ICE COMPANY,
A CORPORATION,
Respondent,

vs.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, INDIVIDUALLY, AND AS PRESIDENT OF THE ICE AND COAL DRIVERS AND HANDLERS LOCAL UNION NO. 953,
Appellants

JURISDICTIONAL STATEMENT

This appeal is taken from the Supreme Court of Missouri, en banc, to the Supreme Court of the United States under the provisions of Title 28, sec. 344 U. S. C. A., Judicial Code, sec. 237, as amended, and of Rule 12 and other pertinent Rules of the Supreme Court of the United States.

Judgment Appealed From

This appeal is from a final judgment of the highest Court of the State of Missouri, in which a decision could be had, in a suit, where there was drawn in question the validity of a Statute (to-wit: Section 8301, Volume 18, Revised Statutes, Annotated, Page 516, of the State of Missouri, copy of which is attached), on the ground of said statute being repugnant to the Constitution of the United States, to-wit: Amendment One thereto, and where the decision of the Supreme Court of the State has been in favor of the validity of said Statute.

Timely Appeal

The Supreme Court of Missouri, after entertaining and considering a timely and proper Motion by appellants for a Rehearing, did, on April 12, 1948, overrule such Motion and on said date the judgment herein by the Supreme Court of Missouri did become final. This appeal has been taken and allowed within three months after such judgment so became final.

Decision and Opinion Below

The decision of the State Court has not as yet been officially published in the Missouri Official Reports but appears in 210 Southwestern Reporter (Second Series), Page 55. It also is printed as an Appendix hereto.

How the Constitutional Question Arose in the Case

Plaintiff's petition alleged that the picketing by defendants was illegal because it was in violation of the Missouri Statute prohibiting combinations in restraint of trade or competition. The Supreme Court held (210 S. W. (2d) l. c. 59) that the petition "sufficiently alleges an unlawful combination in restraint of trade such as Section 8301 condemns." Defendants, in the court of first instance, by

Motion and by Answer, such being the first opportunity so to do, prayed dissolution of the temporary injunction and dismissal of the case on the ground that the granting thereof was an abridgment of freedom of speech and of the press protected by Amendment One to the Constitution of the United States and, in substance, that if the statute and general law were construed to render such peaceable picketing unlawful, then said statute and law were unconstitutional and void as in violation of Amendment One. Such constitutional question was kept alive by defendants throughout the entire proceedings culminating in the final judgment in the Supreme Court of Missouri. The latter Court treated the constitutional question as having been properly and timely raised by defendants and proceeded to decide such question adversely to appellants, notwithstanding the proper invocation by defendants of such specific constitutional right. "Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions" (210 S. W. (2d) l. c. 58).

The Constitutional Question Presented on This Appeal Is Substantial

Technically and on the face of the record, the Supreme Court of the United States has jurisdiction because this is an appeal from a final judgment in a suit in the highest court of a State in which a decision in the suit can be had and where there was drawn in question the validity of a statute of the State of Missouri on the ground of its being repugnant to the Constitution of the United States and the decision has been in favor of the validity of such statute (Judicial Code 237 amended).

However, we recognize that that is not enough. There must be a proper showing that said question is substantiated and to that end we submit the following:

The real and substantial constitutional law question in this case is:

How far may a State go, in the exercise of police power, in the abridgment of freedom of speech and of press, on the ground that there is clear and present danger to the public, because the exercise of such freedom in a given case results, to a degree, in restraint of trade or competition; has the State of Missouri, by the statute, transcended such police power and that as a result thereof said statute, as construed, is unconstitutional because it is in conflict with Amendment One to the Constitution of the United States?

The Supreme Court of the United States has held (authorities hereinafter cited) that before freedom of speech can be abridged by State law on the ground of clear and present danger to the public, the substantive evil must be extremely serious and the degree of imminence extremely high. Its presence cannot be inferred, may not rest upon deduction, but must be shown to exist beyond all reasonable doubt. The relation between the clear and present danger and the exercise of the freedom must be inextricable the one from the other. Results from the exercise of the freedom that are incidental, indirect, not substantial, casual or fortuitous, cannot afford a basis for abridgment of the constitutional freedom of speech and of press.

The decision by the State court is not guided by, but does ignore, these fundamental principles of constitutional law. In this the State court fell into manifest error in a decision dealing with fundamental principles of constitutional law. The case presents a substantial Federal question within the jurisdiction of the Supreme Court of the United States.

Importance of the Decision by the State Court

The importance of this question is transcendent particularly with reference to, but not confined to, the fundamental rights of labor. The State Supreme Court did not confine

the scope of its decision to those cases in which the effect of freedom of speech upon restraint of trade or competition was direct, substantial and presented clear and present danger to the public. Included in the scope of the State decision are those cases where the effect upon trade and commerce was indirect, casual and fortuitous.

Pratically every State in the Union has legislation, with remarkable similarity in language, prohibiting pools, trusts, combinations and confederations in restraint of trade and of competition. If freedom of speech, as exemplified in peaceable picketing by labor unions in a labor dispute for a lawful purpose, is to be abridged by local law on the ground that the exercise of such right results in restraint of trade and of competition, then, necessarily, the right of picketing under such circumstances is a dead letter. Particularly is this true where in a given case the effect upon trade and commerce and competition is indirect, casual or fortuitous. So especially is this true where the decision against the constitutional right is not based upon clear and present danger to the public and where such limitation is not considered or even mentioned.

It would be difficult to recall a decision upon fundamental constitutional right of freedom of speech more important to labor and to the public than the one now presented to the Supreme Court.

Authorities in Support of the Submission That There Is Here Involved a Substantial Federal Question Giving Jurisdiction to the Supreme Court of the United States.

I.

PEACEABLE PICKETING, BY EXHIBITION OF BANNERS, DISTRIBUTION OF PAMPHLETS AND OTHER LITERATURE, BY WORD OF MOUTH AND BY OTHER MEANS APPROPRIATE AND EXPEDIENT TO ORDINARY AND USUAL PICKETING BY LABOR UNIONS, IS THE EXERCISE OF FREEDOM OF SPEECH AND OF THE PRESS GUARANTEED AND PROTECTED BY AMENDMENTS I AND FOURTEEN TO THE CONSTITUTION OF THE UNITED STATES.

It is our position that the foregoing provisions of constitutional law have been clearly, expressly and of late years uniformly decided by the Supreme Court of the United States. The leading cases are as follows: *Senn* v. *Tile Layers Union*, (May 24, 1937) 301 U. S. 468, 57 S. Ct. 857, 81 Law Ed. 1229; *Thornhill* v. *Alabama*, (April 22, 1940) 310 U. S. 88, 60 S. Ct. 736, 84 Law Ed. 1093; *Carlson* v. *California*, (April 22, 1940) 310 U. S. 106, 60 S. Ct. 746, 84 Law Ed. 1104; *American Federation* v. *Swing*, (February 10, 1941) 312 U. S. 321, 61 S. Ct. 568, 85 Law Ed. 855; *Milk Wagon Drivers Union* v. *Meadowmoor*, (February 10, 1941) 312 U. S. 287, 61 S. Ct. 522, 85 Law Ed. 836, 132 A. L. R. 1200; *Bakery Drivers Union* v. *Wohl*, (March 30, 1942) 315 U. S. 769, 62 S. Ct. 816, 86 Law Ed. 1178; *Carpenters Union* v. *Ritter's Cafe*, (March 30, 1942) 315 U. S. 722, 62 S. Ct. 807, 86 Law. Ed. 1143; *Cafeteria Union* v. *Angelos*, (November 22, 1943) 320 U. S. 293, 64 S. Ct. 126.

II.

NO RESTRICTION OF ANY CHARACTER CAN BE PLACED UPON FREEDOM OF SPEECH AND OF THE PRESS UNLESS THERE IS CLEAR, PRESENT OR IMMINENT DANGER TO THE PUBLIC IF SUCH RESTRAINT IS NOT MADE. . . .

The permissible area of restriction upon freedom of speech and of the press is extremely narrow, and is well marked. Beyond this area governmental authority cannot go. The so-called clear and present danger to the public rule was pronounced by Mr. Justice Holmes in *Schenck* v. *United States* (1919), 249 U. S. 47, 39 S. Ct. 247, 63 Law Ed. 470, which decision has been repeatedly affirmed by the Supreme Court. The restrictions there pronounced have not been relaxed but on the contrary have been narrowed and confined. For example, in *Bridges* v. *State of California* 314 U. S. 252, 62 S. Ct. 190, the court, reviewing the decisions by the Supreme Court upon this doctrine since the decision in the *Schenck* case states:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." (62 S. Ct., l.c. 194).

The discussion of the clear and present danger rule is perhaps clearest in *Bridges* v. *California* (December 8, 1941), 31 U. S. 252, 62 S. Ct., l.c. 193. The court recites the various conditions to which such rule has been applied by the Supreme Court (l.c. 193). The court then states:

> "'Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon the freedom of speech or of the press. The evil itself must be 'substantial.'" Brandeis, J., concurring in *Whitney* v. *California*, supra, 274 U. S. 374, 47 S. Ct. 647. Legislative preference or beliefs

> cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161, 60 S. Ct. 146, 151." (*Bridges* v. *California*, 62 S. Ct., l.c. 193, 194.)

In *Herndon* v. *Lowry* (April 26, 1937), 301 U. S. 242, 57 S. Ct. 732, the court stated:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing, even of utterances of a defined character, must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need, violates the principle of the Constitution." (*Herndon* v. *Lowry*, 57 S. Ct. 732).

Clear and present danger to the public of the State of Alabama did not warrant restriction or impairment of the freedom of speech evidenced by picketing in *Thornhill* v. *Alabama*, 310 U. S. 88; nor did such clear and present danger authorize the restriction upon picketing in California in *Carlson* v. *California*, 310 U. S. 106; nor did it justify restrictions upon picketing in the circumstances of *Journeymen Tailors Union* v. *Miller*, 61 S. Ct. 732, nor under the circumstances of *Bakery and Pastry Drivers* v. *Wohl*, 315 U. S. 769, 62 S. Ct. 816; nor did such clear and imminent danger justify impairment of freedom of speech as evidenced by picketing in the circumstances of the *Swing* case and the *Meadowmoor* case.

It is noteworthy that in all of the cases, since the Thornhill case, that have gone to the Supreme Court of the United States wherein it was claimed that clear and present danger or peril to the public justified restriction of freedom of

speech and of the press as applied to peaceable picketing, the restraints in each case have been held to be in violation of the Constitution and void.

III.

THE PRECISE QUESTION THAT REQUIRES DECISION IS, WHETHER PEACEABLE PICKETING IN CONNECTION WITH A LABOR MATTER IN WHICH LABOR HAS A REAL AND SUBSTANTIAL INTEREST BUT WHERE THERE IS NO LABOR DISPUTE BETWEEN THE EMPLOYER PICKETED AND HIS IMMEDIATE EMPLOYEES, PRESENTS SUCH A CLEAR AND PRESENT OR IMMINENT PERIL AND DANGER TO THE PUBLIC THAT THE LEGISLATURE IS WARRANTED IN RESTRAINING FREEDOM OF SPEECH.

In the decision of this question there must be applied the standards and principles as announced by the Supreme Court of the United States in the many foregoing decisions. In this connection we again stress the rule in the *Bridges* case that what finally emerges from the clear and present danger cases is that the substantive evil must be "*extremely serious*" and the degree of imminence "*extremely high*" before restraints of this character can be constitutionally imposed by the legislature. (*Bridges* v. *California*, 62 S. Ct. l.c. 194.)

The proponents of the law must start admitting that generally peaceable picketing is lawful and presents no clear and present evil to the public justifying its prohibition. They must then go forward and establish that peaceable picketing with respect to a labor matter in which labor has a direct interest, but where there is no immediate dispute between the employer and his employees, is so fundamentally different from picketing generally, that there is, by reason of that fact alone, presented a clear and present evil to the public arising therefrom. In this connection it must be kept in mind that the Supreme Court of the United States has said that "the likelihood, however great, that

a substantive evil will result cannot alone justify a restriction of freedom of speech or of the press. The evil itself must be substantial." (*Bridges* v. *California*, 62 S. Ct., l.c. 193.) And also that the court has said "that the substantive evil must be extremely serious and the degree of imminence extremely high before the picketing can be restrained." (*Bridges* v. *California*, 62 S. Ct., l.c. 193, 194.)

See authorities *supra*.

Where Legality of Peaceable Picketing Is in Question, the Primary Purpose and Object of the Union Is of Great Importance.

Allen Bradley v. *Local Union No. 3*, 325 U. S. 797, 65 S. Ct. 1533. *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, l.c. 497, 60 S. Ct. 982, l.c. 994. *United States* v. *Local 807*, 315 U. S. 521, 62 S. Ct. 642.

The Judgment of the State Court Is Not Based on Non-Federal Ground

The judgment of the Missouri Supreme Court is not based upon an independent non-federal ground adequate to support it. The decision squarely meets the constitutional question raised by defendants and decides that the State statute is valid. The decision does not purport to be based upon non-federal ground. The decision of the constitutional question is so interwoven with any question of fact that one cannot be decided without the other.

Whether there is clear and present danger to the public justifying abridgment of speech and of press, is a question of constitutional law for the Supreme Court of the United States and not a question of fact for the Supreme Court of the State.

"When the decision of a question of fact or of local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, we are not foreclosed by the state's determination of the facts or the local law. Otherwise national authority could be frustrated by local rulings. See Cresswill v. Grand Lodge K. of P., 225 U. S. 246, 56 L. Ed. 1074, 32 S. Ct. 882; Davis v. Wechsler, 263 U. S. 22, 68 L. Ed. 143, 44 S. Ct. 13." United States v. Pink, 315 U. S., l.c. 238, 62 S. Ct., l.c. 569.

In *Jackson County* v. *United States*, 308 U. S. 343, l.c. 350, this Court said:

"Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated."

CLIFF LANGSDALE,
CLYDE TAYLOR,
Attorneys for Appellants.

APPENDIX

IN THE SUPREME COURT OF MISSOURI EN BANC,
JANUARY SESSION, 1948

No. 40,099

EMPIRE STORAGE AND ICE COMPANY, a Corporation,
Respondent,

v.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, *Appellants*

Appeal from the Circuit Court of Jackson County

Plaintiff corporation maintains a cold storage public warehouse where it stores perishable foodstuffs and other perishable merchandise owned by its customers. It also manufactures and sells ice which constitutes from fifteen to twenty per cent of its entire business. Plaintiff's employees are completely unionized by both the C. I. O. and the A. F. of L. The ice which it sells is a union product, not a non-union product. There is no labor dispute of any kind between plaintiff and its employees.

Defendants are members and officers of a labor union, the Ice and Coal Drivers and Handlers Local Union No. 953, which is affiliated with the American Federation of Labor. Its membership is composed of truck drivers for soft drink manufacturers, ice, and coal dealers. The membership also includes individual ice peddlers who operate their own trucks in carrying on their own businesses of selling ice at retail. About eighty per cent of the two hundred ice peddlers doing business in Kansas City are members of the union. The defendants engaged upon a campaign for the purpose of unionizing the remainder. One of the reasons was to establish a minimum wage of $4.00 per day for any helper who may be employed by a peddler. The union has

obtained agreements from all the other manufacturers and distributors of ice in Kansas City under which they are bound not to sell ice to non-union peddlers.

For over twenty years plaintiff has been selling ice at wholesale to individual ice peddlers. The ice peddlers are not employees of plaintiff and never have been. There is no evidence that plaintiff has ever engaged in distributing ice to customers at retail. Sales of ice to peddlers are completed at plaintiff's plant at wholesale rates. Thereafter the peddlers resell the ice at retail to their own customers without being subject to any supervision or control by plaintiff. So far as plaintiff is concerned the peddlers are independent contractors. Only twelve to fifteen peddlers are regular customers of plaintiff.

Defendant Jenkins, President of the Local Union, demanded that plaintiff stop selling ice to non-union peddlers, under the threat he would use means at his disposal to enforce his demand. Plaintiff refused his demand and a picket line was placed at its plant with the result that all deliveries to and from the plant by union drivers were halted. Drivers hauling perishable foodstuffs to plaintiff's plant could not deliver them for storage, and tenants of the storage house could not obtain their foodstuffs stored there. There was no violence. About eighty-five per cent of the plaintiff's storage business was stopped by the picket lines. Defendants insist the only purpose of the picket line was to compel plaintiff to stop selling ice to non-union peddlers, and to obtain such result they had to interfere with plaintiff's business.

Plaintiff brought suit to restrain the picketing on the ground it was pursuant to an unlawful combination in restraint of trade to prevent plaintiff from carrying on its business including the sale of ice, and therefore the picketing was unlawful. Defendants answered they had the right to picket under the freedom of speech provisions of the Federal and State Constitutions.

After a hearing the trial court found defendants were unlawfully conspiring in restraint of trade, the picketing was for an unlawful purpose, and there was no labor dispute between plaintiff and its employees or between plaintiff and

defendants. The court permanently enjoined defendants from picketing plaintiff's plant. Defendants have appealed.

Section 8301, R. S. 1939, Mo. RSA of the article of our statutes entitled "Pools, Trusts, Conspiracies and Discriminations" forbids a combination in restraint of trade and declares it a conspiracy, as follows:

> "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article."

The court en banc has recently held this statute to apply to a situation similar to the one we have here in the case of Rogers *v.* Poteet, — Mo. —, 199 S. W. (2d) 378, and that decision is controlling here and rules this case.

In the Rogers case members of the Milk Drivers and Dairy Employees Local Union combined together to prevent rural milk haulers, independent contractors who were not members of the union, from delivering milk to the dairies' milk processing plants in Jackson County. The court held such combination was "a confederation in restraint of competition in the transportation of fresh fluid milk to all the milk processing plants in that area", pointing out that Section 8301 expressly forbids a combination in restraint of competition in the transportation of commodities.

On the same issues raised here as to the constitutional rights of the defendants to free speech the court said: "In other words, outside of the fundamental guaranties in the Bill of Rights in the Federal and State Constitutions, the question of the legality of such combinations is one of statutory law, not constitutional law." The court held the conspiracy between the union members violated Section 8301 and the common law, and was not protected by the First and Fourteenth Amendments of the Federal Constitu-

tion, and Sections 8, 9 and 10 Article I of the Constitution of Missouri, 1945.

The instant case appears to be even a stronger case than the Rogers case. The plaintiff in that case was an individual hauler whom the union was trying to force into its ranks. But the plaintiff here is a business establishment which is being threatened with the alternative of either ceasing to furnish ice to some of its customers or having its business destroyed through a local transportation combination, substantially denying delivery service to or from its plant in connection with its principal business activity which is storage, not ice selling.

Following the principle laid down in the Rogers case we must hold here that the picketing is unlawful because a combination of union truck drivers involving most of the delivery service transportation in Kansas City comes equally within the condemnation of Section 8301 when it abandons its legitimate sphere of collective bargaining and other properly related dealings with its employers, and seeks to dictate the terms under which an establishment will be either permitted or denied local transportation service.

The defendants have used their local transportation combination improperly to threaten and to produce injury and damage through a boycott of plaintiff's business, and incidentally to injure the business of citizens who are regular customers of its cold storage warehouse, by cutting off supplies to and from its customers. This misuse of their power over local transportation is all the more aggravated by the fact plaintiff's plant is fully unionized and there is no labor dispute between plaintiff and its employees, and there is no labor dispute as the term has been construed by court decisions between plaintiff and defendants, nor even any lawful labor grievance between plaintiff and defendants.

The admitted purpose of defendant's picketing is clearly in violation of Section 8301. Defendant Jenkins testified his union had made agreements with the other ice companies of Kansas City under which the companies agreed not to sell ice to non-union peddlers. By their picketing defendants were attempting to force plaintiff to become a party to such combination. A combination for the purpose of

refusing to sell to a certain person or persons is in direct violation of Section 8301. Our courts have so held in a number of cases. Reisenbichler *v.* Marquette Cement Co., 241 No. 744, 108 S. W. (2d) 343; Heim Brewing Co. *v.* Belinder, 97 Mo. App. 64, 71 S. W. 691; Finck *v.* Schneider Granite Co., 187 No. 244, 86 S. W. 213; State ex rel. *v.* Peoples Ice Co., 246 Mo. 168, 151 S. W. 101; Dietrich *v.* Cape Brewery & Ice Co., 315 Mo. 507, 268 S. W. 38.

In the latter case we said: "Argument is advanced, founded upon the right of a person engaged in a business private in character, to buy from whomsoever he pleases, to sell to whomsoever he will, or to refuse to sell to a particular person. The right does not extend to the allowance of an agreement and concerted action thereunder of such person with others similarly engaged, in the accomplishment of a common design, to destroy the business of another, or to the making of an agreement forbidden by law, and concerted action thereunder, inflicting an injury upon the public. What the defendants could have done severally, by independent action, is essentially different from what they might do collectively, pursuant to an agreement between themselves and by concerted action thereunder." The case of Shaltupsky *v.* Brown Shoe Co., 350 No. 831, 168 S. W. (2d) 1083 is not applicable under the facts or the issues.

Inasmuch as defendants were attempting through its picket line to force plaintiff into a combination which had the concerted purpose of preventing the sale of ice to non-union peddlers, and thus require it to make unlawful discrimination in its sale of ice, it follows that the purpose of the picketing was unlawful.

Picketing for unlawful purposes may properly be enjoined. See Fred Wolferman, Inc. *v.* Root et al., decided today by the court, en banc, and the cases cited therein.

Defendants in this case cite the same decisions of the Supreme Court of the United States in support of their constitutional rights under which they may picket as were cited in the Wolferman case. We refer to that decision for the discussion of these cases and repeat here that they are distinguishable on the facts. We summarized that discus-

sion by stating that none of such cases authorized picketing to induce an employer to do an unlawful act condemned by statute and contrary to public policy, under the constitutional guaranty of freedom of speech.

While the case of Bakery & Pastry Drivers, etc. *v.* Wohl, 315 U. S. 769 dealt with peddlers, described therein as "vendors", of bakery goods it is not apposite here on the issues. The court found no unlawful conduct in that case. In an attempt to unionize the peddlers both the baking companies which supplied the peddlers and customers of the peddlers, in some instances, were picketed. No baking companies were parties to that case. The trial court found that no customers were turned away from the baking companies by reason of the picketing. It also appeared that the baking companies which were then operating delivery routes through employee drivers had notified the unions that at the expiration of their contracts they would no longer employ drivers but would permit the drivers to continue to distribute their baked goods as peddlers. The state court had enjoined the picketing upon the complaint of some of the peddlers on the ground no labor dispute was involved within the meaning of the state statute. Of this the Supreme Court said: "Of course that does not follow: one need not be in a 'labor dispute' as defined by state law to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive."

In Milk Wagon Drivers Union, etc. *v.* Lake Valley Farm Products, Inc., 311 U. S. 91 the union was attempting to organize the peddlers of milk, but as we read the case the picketing which was held lawful was confined to the places of business of the peddlers' customers, and the dairies which supplied the peddlers were not picketed. In that case too, the court observed that increasing use of peddlers to distribute milk caused decreased employment of union milk drivers. It also appears in Milk Wagon Drivers Union, etc. *v.* Meadowmoor Dairies, 312 U. S. 287, where picketing was enjoined because of violence, that the picketing was confined to peddlers' customers.

In Carpenters and Joiners Union, etc. *v.* Ritter's Cafe,

315 U. S. 722, the court upheld the injunction against picketing which a Texas Court had ordered on the ground the picketing constituted a violation of the state anti-trust law. However, the Supreme Court's opinion did not discuss the issue on the anti-trust law, but based its decision on the theory that a State may confine the sphere of communication by picketing to that directly related to the dispute.

The decree in this case forbidding picketing by defendants forbade only the picketing about plaintiff's premises. We affirm the decree. There is nothing in the decree which restrains defendants from informing the public of any labor dispute they may have with the peddlers by any lawful means of dissemination of information, including picketing, wherever the same may be proper. Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions.

Complaint is made that the petition failed to allege an unlawful combination in restraint of trade such as proscribed by Section 8301, and plaintiff failed to prove one. The court found after hearing evidence that defendants had combined in unlawful restraint of trade. We find the proof of such an unlawful combination was sufficient, and as shown above the combination was conceded by defendants as to the violation of the statute in attempting to prevent the sale of ice to non-union peddlers. As to the sufficiency of the petition we find its allegations are somewhat general and well might have been stated in greater particularity. But defendants waived their right to compel this by timely motion. Hamilton *v.* Linn, — Mo. —, 200 S. W. (2d) 69. However, even in its general terms we find the petition sufficiently alleges an unlawful combination in restraint of trade such as Section 8301 condemns.

For the reasons stated, the judgment is *affirmed*.

JAMES M. DOUGLAS,
Presiding Judge.

All concur.

No. 182

In the Supreme Court of the United States

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, *Appellants*,

vs.

EMPIRE STORAGE AND ICE COMPANY, a Corporation, *Appellee*.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

(Paragraph 3 of Rule 12 and Paragraph 3 of Rule 7)

CLIF LANSDALE,
CLYDE TAYLOR,
Attorneys for Appellants.

SMITH-GRIFFITH LAW PRINTING, KANSAS CITY, MO.

Subject Index and Specification, With Page Number, of Points and Authorities Urged and Relied Upon by Appellants.

Cases and Authorities Cited.

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No. 182

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

(Paragraph 3 of Rule 12 and Paragraph 3 of Rule 7)

I.

The status of the case is as follows:

Appeal has been allowed upon proper petition accompanied by the appropriate documents, to the Supreme Court of the United States by the Chief Justice of the Supreme Court of Missouri. Appellants have filed transcript certified by the Clerk of the Supreme Court of the State and have docketed the case. Appellee has filed in this Court its Statement in Opposition to Jurisdiction

accompanied by a Motion to Dismiss or Affirm. The Clerk is proceeding to print those portions of the record required to be printed at this time by paragraph 5 of Rule 12. Appellants are now filing this brief in opposition to appellee's statement and motion as permitted by paragraph 3 of Rule 7.

II.

STATEMENT.

(Page references.) Printing by the Clerk of the complete certified record has not been done at this time, except the Jurisdictional Statement. Hence, page references to the printed record are not now available. As to facts appearing from the Opinion, the page references are to 210 S. W. (2d) (Advance Sheets, May 18, 1948) 55.

This is an action by Empire Storage and Ice Company (appellee) against Joseph Giboney, *et al.* (Appellants), individually and as members and officers of Ice and Coal Drivers and Handlers Local Union No. 953, affiliated with American Federation of Labor, to enjoin appellants from peaceably picketing appellee's plant. Final injunction was granted by the court of first instance and affirmed by the highest court of the state. (53-59).

Appellee operates a cold storage warehouse and manufactures and sells ice to ice peddlers. Appellants are a labor union whose membership includes ice peddlers. Eighty percent of the 200 ice peddlers doing business in Kansas City are members of the union. The union engaged in a campaign for the purpose of inducing the non-union peddlers to become union peddlers and also to establish a minimum wage of $4 per day for a peddler's helper (56).

Appellants sought to induce appellee to aid it in its campaign by appellee's selling ice only to union peddlers. All ice manufacturers in Kansas City, except appellee, sold ice only to union peddlers (56). The object and purpose of the union was to increase its membership by

inducing non-union peddlers to become union peddlers and to fix a wage.

The picketing was of appellee's plant. The picketing was peaceable with no claim of violence or breach of the peace or conduct calculated to promote breach of the peace. The sole ground for the injunction and the judgment awarding the same was that the picketing was for an unlawful purpose in that it constituted an unlawful combination in restraint of trade and competition in violation of Section 8301, Revised Statutes of Missouri, 1939, which, for convenience of reference, is quoted in the note. (56). No other ground of illegality was asserted.

> "Defendants answered they had the right to picket under the freedom of speech provisions of the Federal and State Constitutions" (56).
>
> "The court (i. e., the lower court) permanently enjoined defendants from picketing plaintiff's plant" (56).

The state court construed said Section 8301 as rendering unlawful any picketing that resulted in restraint of trade or competition, however lawful such picketing otherwise might be. The court did not set up any distinction based upon the amount or character of restraint of trade; made no distinction between those cases where restraint of trade was the direct object, purpose and effect of the picketing, and those cases wherein such results were merely incidental, casual or fortuitous. As we

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NOTE:

"Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article." (Section 8301, Revised Statutes of Missouri, 1939.)

conceive it, the opinion the state court is holding is that any picketing, however otherwise lawful, becomes unlawful when it results in restraint of trade or competition; that such is the legal meaning of Section 8301; and that said Section, so construed and applied, does not deprive appellants of any constitutional rights.

III.

On the face of the record as it is now presented, the Supreme Court has unassailable jurisdiction.

On the face of the record, as now presented, the Supreme Court has undoubted jurisdiction of this appeal under Judicial Code 237(a), as amended, Title 28 U. S. C. A., Section 344(a), which provides:

> "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error (now appeal)."

The Petition for Appeal, the Judicial Statement, now printed and before the court, the Assignment of Errors and other documents certified by the Clerk of the State Court and filed herein, bring the appeal squarely within the provisions of said Section 237(a) Judicial Code.

The final decree was in the highest court of Missouri in which a decision in the suit could be had; the validity of a Missouri statute (Section 8301, Volume 18, Revised Statutes, Page 516, of the State of Missouri) as construed by the Supreme Court of Missouri, was drawn in question as being repugnant to the Constitution of the

United States and particularly Amendment One thereto; and the decision of the state court was in favor of the validity of the statute. Appellants in the court of first instance, by motion and by answer on first opportunity so to do, invoked the protection of the Constitution of the United States. Appellants throughout the litigation, by pleadings, briefs, and other proper methods, submitted and contended that if the state statute were construed to render unlawful and enjoinable the peaceable picketing here involved, then said statute was unconstitutional and void, because in violation of Amendment One. The State Supreme Court in its opinion and decision treated the constitutional question as having been properly and timely raised by appellants, but proceeded to decide such constitutional question adversely to the appellants. This, notwithstanding the proper invocation by defendants of such specific constitutional rights. The court said:

> "'Defendants answered they had the right to picket under the freedom of speech provisions of the Federal and State Constitutions'' (57).
>
> "Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions.'' (210 S. W. (2d) l. c. 58).

Hence, appellants submit that upon that part of the printed record now before the court, the case is precisely and exactly within the provision of said Section 237(a) of the Judicial Code and for that reason the Motion to Dismiss or Affirm should be overruled.

We are aware and concede that even though technically the Supreme Court has jurisdiction under said Section, yet such jurisdiction will not be exercised unless the Federal question be substantial. We are not aware how far

the court may desire to go into the question of the substantial nature of the constitutional question at this stage of the proceedings. The court, in the present status of the case, has before it only those portions of the record required to be printed under the provisions of Paragraph 5 of Rule 12. That is, the court does not now have the entire printed record. Appellee may, under Paragraph 3 of Rule 7, file its Motion to Dismiss or Affirm after the entire printed record is before the court and it would seem that the court would then be in better position to pass upon the substantial nature of the constitutional question rather than now with only a portion of the printed record before the court.

Appellants, however, in their Jurisdictional Statement, now printed and before the court, submitted, together with argument and citation of authorities, that the constitutional question was substantial and of great import. In furtherance of such submission in the Jurisdictional Statement appellants submit the following:

IV.

The constitutional question presented on this appeal is substantial and is of such nature as to require the court to hear the parties in brief and in oral argument, upon the entire record.

There Is a Labor Dispute in this Case.

The opinion by the Supreme Court of the State, and also appellee, both stress the statement, "there is no labor dispute of any kind between plaintiff and its employees," and that hence the established principles governing the rights and obligations of parties to a labor dispute do not apply. Manifestly, this is *nonsequitur*. The fundamental object, the overriding purpose, of the union was to increase its membership by inducing non-union peddlers

to become union peddlers and, by union activity, to fix a minimum wage for helpers. It sought to induce appellee to aid it in the accomplishment of such purpose by refusing to sell ice to non-union peddlers. The ice company refused. This constituted a labor dispute, notwithstanding there was no controversy between appellee and its immediate employees. It is settled that a labor dispute can exist even though none of the employees of the picketed employer are members of the picketing union. *Senn* v. *Tile Layers Union*, 301 U. S. 468, 57 S. Ct. 857; *American Federation of Labor* v. *Swing*, 312 U. S. 321, 61 S. Ct. 568; *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 42 S. Ct. 72, and other cases.

The foregoing question was squarely and specifically submitted to the Supreme Court as evidenced by the following language in the *American Federation of Labor* Case, *Supra*:

> "The decree (of the Supreme Court of Illinois) recited 'that this Court and the Supreme Court of this State have held in this case that under the law of this State, peaceful picketing or peaceful persuasion are unlawful when conducted by strangers to the employer (i.e., where there is no approximate relation of employee and employer), and that appellants are entitled in this case to relief by injunction against the threat of such peaceful picketing or persuasion by appellees.'" (312 U. S., l. c. 324:)

The Supreme Court held directly to the contrary:

> "We are asked to sustain a decree which for the purposes of this case asserts as the common law of a state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him.
>
> "Such a ban of free communication is inconsist-

ent with the guarantee of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 209, 42 S. Ct. 72, 78. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case." (*American Federation of Labor* v. *Swing*, 312 U. S. 321, l. c. 325, 61 S. Ct. 568, l. c. 570).

In *New Negro Alliance* v. *Sanitary Grocery Company*, 303 U. S. 552, 58 S. Ct. 703, the matter in controversy was whether the case involved or grew out of a labor dispute. The decision of the Supreme Court was in the affirmative. The Negro Alliance, doing the picketing, was a corporation composed of negroes organized for mutual improvement of its members. No member or representative thereof was, or ever had been, or desired to be, employed by the grocery company. There was no dispute or con-

troversy between the company picketed and its employees. The purpose of the picketing was to induce or compel the grocery company being picketed to employ Negro employees. The case was decided on the pleadings. The Bill of Complaint alleged that the defendants doing the picketing were unlawfully conspiring "to picket, boycott, and ruin respondent's business in its stores and particularly the store at 1936 11th Street." It was further alleged that the acts of the defendants were "unlawful, constitute a conspiracy in restraint of trade, and if continued will ruin respondent's business." This court held that the case presented a labor dispute.

V.

The Decision of the state court as to the meaning and effect of a state statute is final. But its decision as to the constitutionality of the statute, as construed by the Supreme Court of the State, is subject to review by the Supreme Court of the United States.

Appellee submits:

"It is submitted that the decision of the Supreme Court of Missouri construing and applying a statute of the State of Missouri is conclusive and is not reviewable by the Supreme Court of the United States."

It is true that the meaning, scope and legal effect of a state statute is exclusively for the state. However, the question of the constitutional validity of a state statute as construed by the state court is not exclusively for the state court. Such decision is reviewable by the Supreme Court of the United States. Appellants have not by Assignment of Error, Jurisdictional Statement, Points Relied Upon, or otherwise sought to have reviewed the correctness of the state court's decision as to the meaning of the state statute. Our submission is quite different. It

is that, accepting the decision of the state court of the meaning of the statute as final, the statute, as so construed, is void because in conflict with the Constitution of the United States.

VI.

The decision by the state court cannot be justified on the ground that freedom of speech is not an absolute right.

Appellee submits:

"The right of free speech is not absolute at all times and under all circumstances." Hence, it is contended that the abridgment of freedom of speech here involved is permissible because the right of free speech is not absolute.

Again, this is *non sequitur*. It is admitted that the constitutional right of free speech is not absolute. Nor, for that matter, is any other constitutional right, even the right of life. The sovereignty may hang a man if the ritual commonly called "due process" is religiously adhered to. The sovereignty may draft a man and send him to his death on a battlefield. If the constitutional right of life were absolute, the sovereignty could legally do neither.

Although these fundamental constitutional rights are not absolute, they may not lightly be abridged.

VII.

The doctrine of clear, present, or imminent danger to the public.

It is at this point that the doctrine of clear, present, or imminent danger to the public comes into play. No abridgment of any character can be placed upon freedom

of speech and of the press or of any other fundamental constitutional right unless there is clear, present, or imminent danger to the public if such abridgment be not made.

The doctrine of clear, present, or imminent danger to the public is applicable to freedom of speech as exemplified by peaceable picketing. *Schenck* v. *U. S.* (1919), 249 U. S. 47, 39 S. Ct. 247.

The restrictions in that case pronouncing upon abridgment upon freedom of speech have not been relaxed but have been narrowed and confined. *Bridges* v. *State of California*, 314 U. S. 252, 62 S. Ct. 190; *Herndon* v. *Lowry*, 301 U. S. 242, 57 S. Ct. 732; *Thornhill* v. *Alabama*, 310 U. S. 88; *Schneider* v. *New Jersey*, 308 U. S. 147, 60 S. Ct. 146.

> 'What finally emerges from the 'clear and present danger' cases is a working principal that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.'' (*Bridges* v. *State of California*, 314 U. S. 252.)

> '' 'Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon the freedom of speech or of the press. The evil itself must be substantial.' Brandeis J. concurred in *Whitney* v. *California, supra*, 274 U. S. 374. Legislative preferences or beliefs cannot transform minor matters of public inconvenience or annoyance into substantive evils of such weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161.'' (*Bridges* v. *State of California*, 314 U. S. 252.)

> ''The power of the state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing, even of utterances of a

defined character, must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principles of the Constitution." (*Herndon* v. *Lowry*, 301 U. S. 242.)

Clear and present danger to the public of the State of Alabama did not warrant restriction or impairment of freedom of speech evidenced by picketing in *Thornhill* v. *Alabama*, 310 U. S. 88; nor did such clear and present danger authorize the restriction upon picketing in California in *Carlson* v. *California*, 310 U. S. 106; nor did it justify restrictions upon picketing in the circumstances of *Journeymen Tailors Union* v. *Miller*, 312 U. S. 658; nor under the circumstances of *Bakery and Pastry Drivers* v. *Wohl*, 315 U. S. 769; nor did such clear and imminent danger justify impairment of freedom of speech as evidenced by picketing in the circumstances of the *Swing* and *Meadowmoor* cases.

It is noteworthy that in all of the cases, so far as we have been able to find since the *Thornhill* case that have come to the Supreme Court of the United States wherein it was claimed that clear and present danger or peril to the public justified the given restrictions or abridgment of freedom of speech and of the press as applied to peaceable picketing, the restrictions in each case have been held to be in violation of the Constitution and void.

It is therefore submitted that even though, as claimed by appellee, that freedom of speech is not absolute, yet such freedom may not be abridged unless there is clear, present or imminent danger to the public if such restraint

be not made. It is likewise submitted that upon the record in this case there was not present the danger or peril to the public justifying the abridgment here involved.

VIII.

The exact questions decided by the Missouri Supreme Court.

The Supreme Court of Missouri has in this case held:

1. That peaceable and otherwise lawful picketing becomes unlawful and enjoinable where the result thereof is lessened trade or competition.

2. That concerted action by union members in otherwise lawful picketing becomes an unlawful pool, trust, agreement, combination, confederation or understanding in restraint of trade of competition where the result of such picketing is lessened trade or competition in fact.

3. That such otherwise lawful picketing is made unlawful by the Missouri Antitrust Act (Section 8301, Vol. 18; Revised Statutes of Missouri, Annotated, as construed by the state court).

4. That such state statute so construed and applied does not deprive appellants of any right guaranteed them by the Constitution of the United States.

It is to be noted:

That the state court does not set a standard or otherwise fix the limits for determination of the amount of lessened trade or competition necessarily present before lawful picketing becomes unlawful under the Missouri Statutes.

Nor does the court make any distinction between a case where the primary and overriding purpose of the picketing is for the promotion of a lawful and legitimate union objective and where lessened trade or competition

is incidental; and the case where lessened competition and trade is the direct object and purpose of the picketing.

IX.

Peaceable picketing, by exhibition of banners, distribution of phamphlets and other literature, by word of mouth and by other means appropriate and expedient to ordinary and usual picketing by labor unions, is the exercise of freedom of speech and of the press guaranteed and protected by amendments one and fourteen to the Constitution of the United States.

It is our position that the foregoing provisions of constitutional law have been clearly, expressly and of late years uniformly decided by the Supreme Court of the United States. The leading cases are as follows: *Senn* v. *Tile Layers Union* (May 24, 1937), 301 U. S. 468, 57 S. Ct. 857, 81 Law Ed. 1229; *Thornhill* v. *Alabama* (April 22, 1940), 310 U. S. 88, 60 S. Ct. 736, 84 Law Ed. 1093; *Carlson* v. *California* (April 22, 1940), 310 U. S. 106, 60 S. Ct. 746, 84 Law Ed. 1104; *American Federation* v. *Swing* (February 10, 1941), 312 U. S. 321, 61 S. Ct. 568, 85 Law Ed. 855; *Milk Wagon Drivers Union* v. *Meadowmoor* (February 10, 1941), 312 U. S. 287, 61 S. Ct. 552, 85 Law Ed. 836, 132 A. L. R. 1022; *Bakery Drivers Union* v. *Wohl* (March 30, 1942), 315 U. S. 769, 62 S. Ct. 816, 86 Law Ed. 1178; *Carpenters Union* v. *Ritter's Cafe* (March 30, 1942), 315 U. S. 722, 62 S. Ct. 807, 86 Law Ed. 1143; *Cafeteria Union* v. *Angelos* (November 22, 1943), 320 U. S. 293, 64 S. Ct. 126.

"For the reason set forth in our opinion in *Thornhill* v. *Alabama*, *supra*, publicizing the facts of a labor dispute in a peaceful way, through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that lib-

erty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state." (*Carlson* v. *California*, 310 U. S. 106, 60 S. Ct., l. c. 749.)

"The freedom of speech and of the press which are secured by the First Amendment against abridgement by the United States are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a state. The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and feasible reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evils averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of corrective error through the processes of popular government." (*Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 740-741.)

"In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague* v. *C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 Law Ed. 1423; *Schneider* v. *State*, 308 U. S. 147, 155, 162, 163, 60 S. Ct. 146, 151. See *Senn* v. *Tile Layers Union*, 301 U. S. 468, 478, 57 S. Ct. 857, 862, 81 Law Ed. 1229." (*Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct., l. c. 744.)

"More thorough study of the record and full argument have reduced the issue to this: is the constitu-

tional guarantee of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute!" (*American Federation* v. *Swing*, 312 U. S. 321, 61 S. Ct., l. c. 569.)

"Members of a union might without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." (*Senn* v. *Tile Layers Union*, 301 U. S. 468, 57 S. Ct. 857, l. c. 862.)

"The starting point is Thornhill's case. That case invoked the constitutional protection of free speech on behalf of a relatively modern means for 'publicizing without annoyance or threat of any kind the facts of a labor dispute.' 310 U. S. 100, 60 S. Ct. 743, 84 Law Ed. 1093. The whole series of cases defining the scope of free speech under the Fourteenth Amendment are facets of the same principle in that they all safeguard modes appropriate for assuring the right to utterance in different situations. Peaceful picketing is the working man's means of communication." (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 61 S. Ct., l. c. 555.)

"So far as we can ascertain from the opinions delivered by the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved. Of course, that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." (*Bakery Drivers Union* v. *Wohl*, 315 U. S. 769, 62 S. Ct., l. c. 818.)

"The constitutional right to communicate peaceably to the public the facts of a legitimate dispute, is not lost merely because a labor dispute is involved, *Thornhill* v. *Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 Law Ed. 1093, or because the communication takes the form of picketing even when the communication does not concern a dispute between employer and those directly employed by him. *American Federation of Labor* v. *Swing*, 312 U. S. 321, 6 S. Ct. 568, 85 Law Ed. 855." (*Carpenters Union* v. *Ritter*, 62 S. Ct. 807, 315 U. S. 722.)

X.

A state may not by statute or judicial act declare peaceable and otherwise lawful picketing, unlawful and enjoinable, on the ground that an incidental effect of such picketing is or may be lessened trade or competition.

Such state action abridges freedom of speech and of press guaranteed by the Constitution of the United States.

The right of labor to organize to better wages and working conditions is a fundamental constitutional right. Peaceable picketing to aid in the accomplishment of such lawful purposes is likewise a fundamental constitutional right because, under these circumstances, peaceable picketing is an exercise of freedom of speech and of press. The Supreme Court of Missouri has in this case abridged these constitutional rights and its final judgment so doing should be reversed.

It is manifest even from the truncated record now before the court that the overriding purpose of the appellants was to increase the membership of their union by inducing non-union peddlers to become union peddlers and to better wages of assistant peddlers. These were lawful purposes. Lessened trade or competition was but an incidental effect of the economic pressure put upon the em-

ployer to aid in the accomplishment of the union's lawful objective.

This is not a case of a combination of those engaged in an industry as employers and a labor-union or unions for the primary purpose of suppressing competition and fixing prices, such as was before the court in *Allen Bradley Company* v. *Local Union No. 3*, 325 U. S. 797, 65 S. Ct. 1533, and in the case of *United Brotherhood* v. *United States*, 330 U. S. 395, 67 S. Ct. 775. Rather is this case more like the case of the *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, 60 S. Ct. 982. In the *Allen Bradley Company* and *United Brotherhood* cases, *supra*, lessened competition and fixing of prices was the direct object which dominated the conduct of the confederation between employer and labor. Here, strengthening the union by increase of membership and fixing wages, i. e., the lawful purposes of the union, dominated the situation and lessened competition and fixing of prices was incidental.

> "The question remains whether the effect of the combination or conspiracy among respondents was a restraint of trade within the meaning of the Sherman Act. This is not a case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices. See *United States* v. *Brims*, 272 U. S. 549; *Local 167* v. *United States*, 291 U. S. 293. Here it is plain that combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers tortious acts was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on price of hosiery in the market, and so was in that

> respect no more a restraint forbidden by the Sherman Act than the restrictions upon competition and the course of trade held lawful in *Appalachian Coal, Inc., v. United States, supra*, because notwithstanding its effect upon the market of coal it nevertheless was not intended to and did not affect market prices." (310 U. S. 501.)

It must be borne in mind that in the *Appalachian* case the court was dealing with a situation where there was by force and violence a substantial interruption of movement of goods in interstate commerce. True, the Supreme Court was dealing with the meaning, scope and effect of the Sherman Act, but the controlling principle there involved is identical with that here involved.

It is our submission that a state may not forbid peaceable picketing for lawful purpose under the guise of legislation against pools and conspiracies in restraint of trade or competition or for fixing prices where the effect upon the commerce is but an incident of the exercise of the constitutional right of freedom of speech and of press exemplified in lawful picketing. All lawful picketing, if it be at all effective, necessarily and inherently has an incidental effect upon trade and commerce. If the state may make unlawful peaceable picketing for a lawful purpose because such picketing tends to lessen competition and restrain trade then the state may make all picketing unlawful because all picketing does have such tendency. This would be a return to the old English cases which held that the mere formation of a union by labor to better its condition and wage was a criminal conspiracy because it was in restraint of trade. 63 Corpus Juris 656, 13 American Jurisprudence 849, where the cases are collected.

The reasoning in the old English cases and this case is the same. There the mere formation of a union was held to be unlawful because it did have a tendency to restrain competition. Here the court has held that otherwise lawful picketing is unlawful because as an incidental effect thereof competition is lessened.

Of course, the old English doctrine was repudiated in England and has never been the law in the United States. With few minor exceptions the United States courts have uniformly held, and the principle is now settled beyond question, that labor does have the right to organize to improve its wages and working conditions and no court has held that the mere incidental effect of restraint of trade renders such organization and its lawful activities illegal.

XI.

It is settled that the fact that picketing, which is peaceable and otherwise lawful, causes loss of trade and other harm to the employer picketed does not cause such picketing to be unlawful.

In *Senn* v. *Tile Layers Union*, 301 U. S. 468, 57 S. Ct. 857, the court said:

> "It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. * * * It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right." (57 S. Ct. l. c. 863.)

In *Park & Tilford* v. *International Brotherhood* (California), 165 P. (2d) 891, it is said:

> "Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect on his business that may result from his own competition with other employers. It is one of the risks of business. See *C. S. Smith Met. Market Co.* v. *Lyons*, 16 Cal. (2d) 389, 106 P. (2d) 414. 'The law * * * permits workers to organize and use their combined power in the market, thus restoring, it is thought, the equality of bargaining power upon which the benefits of competition and free enterprise rest. Accordingly, the propriety of the object of workers' concerted activity does not depend upon a judicial determination of its fairness as between workers and employers.' 4 Restatement: Torts, p. 118. In *Stillwell Theatre Inc.* v. *Kaplan*, 259 N. Y. 405, 182 N. E. 63, 65, 84 A. L. R. 6, an employer, bound by a closed shop agreement with one union, suffered great hardship when his theatres were picketed by another that sought to win over his employees. The New York Court of Appeals denied injunctive relief, declaring: 'The Court of Appeals has for many years been disposed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved. The employer, if threatened in his business life by the violence of the unions or by other wrongful acts, might have the aid of the court to preserve himself from damage threatened by the recourse to unlawful means, but the right of the workman to organize to better their condition has been fully recognized. The fact that such action may result in incidental injury to the employer does not in itself constitute a justification for issuing an injunction against such acts.' See *United States* v. *Hutcheson*, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788; *Fur Work-*

ers' Union No. 72 v. *Fur Workers' Union No. 21238*, 70 App. D. C. 122, 105 F. (2d) 1." (165 P. (2d) l. c. 896.)

XII.

Importance of the decision by the state court.

The importance of this question is transcendent particularly with reference to, but not confined to, the fundamental rights of labor. The State Supreme Court did not confine the scope of its decision to those cases in which the effect of freedom of speech upon restraint of trade or competition was direct, substantial and presented clear and present danger to the public. Included in the scope of the state decision are those cases where the effect upon trade and commerce was indirect, casual and fortuitous.

Practically every state in the Union has legislation, with remarkable similarity in language, prohibiting pools, trusts, combinations and confederations in restraint of trade and of competition. If freedom of speech, as exemplified in peaceable picketing by labor unions in a labor dispute for a lawful purpose, is to be abridged by local law on the ground that the exercise of such right results in restraint of trade and of competition, then, necessarily, the right of picketing under such circumstances is a dead letter. Particularly is this true where in a given case the effect upon trade and commerce and competition is indirect, casual or fortuitous. So especially is this true where the decision against the constitutional right is not based upon clear and present danger to the public and where such limitation is not considered or even mentioned.

It would be difficult to recall a decision upon fundamental constitutional right of freedom of speech more

important to labor and to the public than the one now presented to the Supreme Court.

Respectfully submitted,

CLIF LANGSDALE,
CLYDE TAYLOR,
Attorneys for Appellants.

Address of Attorneys,
922 Scarritt Building,
Kansas City, Missouri.

ADDENDA.

We are justified in our judgment, in citation of and additional quotation from, *American Steel Foundries v. Tri City Council*, 257 U. S. 184.

In the first place, the opinion of Mr. Chief Justice Taft lays down the elements that may render otherwise lawful picketing unlawful, such as violence, mass picketing, intimidation and the like. Let it be noted that in this case there is not present one element, nothing resembling any such element, specified in that case.

In the second place, the *Tri-City* case holds that they who labor have the right (so fundamentally a right of free men that it is guarded by the Constitution) to organize for their mutual benefit. And by peaceable and otherwise lawful persuasion to induce others to strike, and to withhold patronage from, and refuse to deal with an employer, against whom such persuasion is leveled, in order to gain labor's lawful object of bettered working conditions and wages. No federal or state act can take away such fundamental right.

In the third place, the case holds that where the real interest of a union is involved, the right of the members to encourage a strike, engage in persuasion and peaceable picketing is not affected by the fact that there is no controversy between the given employer and his immediate employees.

We quote (l. c. 208):

> "Is interference of a labor organization by persuasion and appeal to induce a strike against low wages under such circumstances without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the Courts. They were organized out of necessities of the

situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any courts. The strike became a lawful instrument in a lawful economic struggle or competition between an employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild."

The arguments by appellee are at war with the principles pronounced in the *Tri-City* case. If such arguments are to prevail, the *Tri-City* case must be disregarded.

A lawful strike, peaceable persuasion, lawful picketing, if it be at all successful, *must* result in lessened competition and restraint of trade. That is inevitable. If a state may prohibit lawful persuasion and peaceable picketing, on the ground that as a result thereof trade is restrained, competition is lessened, then may the state prohibit and render of no avail any picketing or persuasion or striking whatsoever.

No. 182.

In the Supreme Court of the United States

October Term, 1948.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, *Appellants*,

vs.

EMPIRE STORAGE AND ICE COMPANY, a Corporation, *Appellee*.

BRIEF FOR APPELLANTS.

CLIF LANGSDALE,
Attorney for Appellants.

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vs.

EMPIRE STORAGE AND ICE COMPANY, a Corporation, *Appellee.*

No. 182.

BRIEF FOR APPELLANTS.

Opinion Below.

The opinion of the Supreme Court of the State of Missouri (R. 59-65) is reported in 210 S. W. (2d) (Advance Sheets, May 18, 1948) 55. It is not yet officially reported.

Jurisdiction.

The federal questions here presented were properly raised and preserved and were passed upon by the courts below (R. 6-7, 8, 51; 60). The judgment of the Supreme Court of Missouri was entered on March 8, 1948 (R. 78). Appellants' motion for rehearing was overruled on April 12, 1948 (R. 65).

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended, 28 U. S. C. Section 344(a). On October 11, 1948, this Court noted probable jurisdiction (R. 77).

Question Presented.

The question presented is whether a state court may, pursuant to its construction of a state statute prohibiting conspiracies and combinations in restraint of trade, enjoin a labor organization composed of ice truck drivers from seeking to unionize nonunion peddlers by peacefully picketing the premises of an ice company with placards truthfully stating that the company sells ice to nonunion peddlers.

Statute Involved.

The pertinent provision of the Missouri statutes (Mo Rev. Stat., Vol. 18, p. 516, Section 8301) is as follows:

> "Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing brought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in this article."

STATEMENT.

This case arises out of a controversy over the unionization of ice truck drivers, or peddlers, in Kansas City, Missouri, and the wages to be paid their helpers. The dispute relates to the conditions under which ice is sold and delivered to retailers. The issue is whether ice truck drivers who are members of the union may constitutionally be prohibited from publicizing their side of the dispute by peaceful picketing at the premises of a producer-wholesaler who sells ice to nonunion drivers.

About eighty percent of the approximately two hundred ice peddlers in Kansas City, Missouri, are members of Ice and Coal Drivers and Handlers Local Union No. 953, affiliated with American Federation of Labor (R. 59, 33-35). The union admits to membership all truck drivers delivering and selling ice and coal, whether or not the drivers own their own trucks (R. 42). Peddlers' helpers, who are also members of the union, are protected by a union wage scale pursuant to which helpers are paid a minimum of four dollars a day (R. 59; 35). Some, at least, of the peddlers who are not members of the union pay their helpers "much less" than the minimum paid by union peddlers (R. 35).

In an effort to preserve the working conditions and wage standards it had established, the union solicited nonmember peddlers to join the union (R. 40; 35). When such solicitation proved unsuccessful the union resorted to the traditional, peaceful methods available to it for self-protection against the depressing wage competition of the nonunion peddlers. The union persuaded all but one ice producing company which furnished ice to its members to agree not to furnish ice to peddlers who refused to join the union and pay the union wage scale (R. 59-60; 34, 44). The remaining producer-wholesaler,

Empire Storage and Ice Company refused the union's request that it refrain from furnishing ice to nonunion peddlers (R. 60; 13-14, 15-16, 39-40).

The Company's president, W. Ralph Wilkerson, advised the union representative that his refusal was based upon the fact that, "I was hired as a manager of that Company to retain business and not drive it away. It would be inconsistent for the manager of the Company to do that" (R. 14).

Therefore, to publicize the dispute, with the object of persuading the nonunion drivers to join the union (R. 28, 35-36), the union placed a picket approximately 15 to 25 feet in front of the main entrance to the Company's plant. The picket carried a sign reading "Empire Cold Storage Company sells ice to nonunion peddlers" (R. 28-29, 35-36). There was no violence or threat of violence accompanying the picketing (R. 60).

Observing the picketing, members of the Union, drivers sympathetic with the union's cause, refused to cross the picket line and patronize the Company with the result that both ice and storage, the Company's business, fell off approximately eighty-five percent (R. 60; 17-18, 19, 21, 24, 31).

To prevent this interference with its business, the Company, on July 8, 1946, filed in the Circuit Court of Jackson County, Missouri, a petition for injunction (R. 1-4). The Company named Joseph Giboney, Harold Hackell, Paul Mandalia, Sam Ippolito, Harry Weston, Walter Downey, Roy Uttinger, James Pike, Terrill Henry and A. J. Jenkins, individually and as representatives of all other members of the Union, as defendants in the action. The defendants, except Jenkins, were designated only as "members of the Ice and Coal Drivers and Handlers Local Union No. 953" who were not employed by the

Company. Jenkins was identified as "acting president and business agent of said association" (R. 1). The complaint alleged that the defendants placed pickets "about and around the premises operated by plaintiff in its warehouse, cold storage and ice business in Kansas City" (R. 2); that the purpose of the picketing was to prevent plaintiff "from servicing its customers in its warehouse, cold storage and ice business * * * and forcing its customers to patronize rival business, industries and enterprises" (R. 3); that the defendants in combining to picket for this purpose "entered into an unlawful agreement, combination and understanding in restraint of trade in the rendition of warehouse cold storage and ice service to the general public," and that in consequence of the picketing plaintiff and the public suffered irreparable damage (R. 3). The complaint further alleged that "there is no labor dispute existing between the plaintiff and its employees and there is no labor dispute existing between the defendants, and each of them and this plaintiff" (R. 2). The complaint prayed that a temporary injunction be issued pending trial, and thereafter that a permanent injunction issue restraining and enjoining the defendants, and each of them, from placing pickets or picketing around and about the buildings of plaintiff used in the cold storage warehouse and ice business in Kansas City, Missouri" (R. 4).

On the same day, the court issued a temporary injunction in the language requested in the complaint (R. 4-5). On July 19, 1946, defendants filed a motion to dissolve the temporary injunction on the ground that the complaint failed to state a cause of action and that the restraining order violated the rights of defendants under, *inter alia*, the First and Fourteenth Amendments to the Constitution of the United States (R. 7-8). On July 19,

1946, defendants also filed an answer to the complaint alleging, among other things, that "there is a labor dispute existing between the said defendants and the plaintiff, in that plaintiff is selling ice to peddlers who are not members of the said defendants' union," and that their right peacefully to picket plaintiff's premises is protected by the First and Fourteenth Amendments (R. 6-7).

On July 29, 1946, the court entered an order overruling defendants' motion to dissolve the temporary injunction and fixing the date of August 8, 1946, for further hearing on the temporary injunction (R. 8). On August 8, 1946, the parties agreed that the hearing should be on the question whether a permanent injunction should issue and the court approved this agreement (R. 9). At the conclusion of the hearing on August 8, the court entered its judgment, finding that the defendants "engaged in an agreement, combination and understanding to picket plaintiff's warehouse, cold storage and ice plant * * * and thereby to prevent ingress and egress thereto and therefrom and thereby interfere with the relationship between plaintiff and its customers and in unlawful restraint of trade of plaintiff, and for the further purpose of alienating and driving away plaintiff's customers" (R. 49). The court further found that "there does not here exist any labor dispute within the meaning of the law * * * and that there is no labor dispute whatever involved. That said conspiracy is for an unlawful purpose, and that picketing used to carry out said purpose is also unlawful" (R. 50). The court thereupon entered a permanent injunction enjoining "the named defendants and all other members of the Ice and Coal Drivers and Handlers Local Union No. 953 * * * from placing pickets or picketing, around and about the buildings of plaintiff

described above, and used by plaintiff in the cold storage, warehouse and ice business in Kansas City, Missouri'" (R. 50-51).

From this judgment the defendants appealed to the Supreme Court of Missouri, urging the constitutional objections raised below (R. 52-53, 54-55, 56, 63). On March 8, 1948, the Supreme Court of Missouri entered its opinion and judgment of affirmation (R. 58-65).

In its opinion the court held that despite the fact that the picketing was wholly peaceful (R. 60), it was unlawful because its purpose "to compel plaintiff to stop selling ice to nonunion peddlers" was in restraint of trade and therefore violated Section 8301 of the Missouri statutes (R. 60-62). The court held that when a labor union "abandons its legitimate sphere of collective bargaining and other properly related dealings with its employers and seeks to dictate the terms under which an establishment will be either permitted or denied local transportation service," the union commits an unlawful act despite the fact that, as here, the denial of transportation service results solely from peaceful picketing and the voluntary refusal of drivers to cross the picket line (R. 62). The court further held that the dispute between plaintiff and defendants over the sale of ice to nonunion peddlers is "no labor dispute as that term has been construed by court decisions" (R. 62).

In construing Section 8301 as applicable to the picketing here engaged in the court stated that that section renders unlawful any "combination for the purpose of refusing to sell to a certain person or persons" (R. 62). The court stated that the agreements between the union and ice companies in Kansas City, other than plaintiff, pursuant to which such companies agreed not to sell ice to nonunion peddlers were themselves violative of

this Act (*ibid*), and that the attempt by picketing to induce plaintiff to enter into such an agreement was an attempt to induce plaintiff to commit an illegal act (*ibid*). Concluding that picketing for the purpose of attempting to prevent the sale of ice to nonunion peddlers was *per se* violative of Section 8301, and that an injunction against such picketing did not violate the First and Fourteenth Amendments, the court affirmed the judgment below (R. 63-65).

On April 12, 1948, the Supreme Court of Missouri denied appellants' motion for rehearing (R. 65), and on October 11, 1948, this Court noted probable jurisdiction of the appeal (R. 77).

SPECIFICATIONS OF ERRORS TO BE URGED.

The court below erred:

1. In holding that when a labor organization composed in part of ice peddlers is seeking to induce nonmembers to join the union, a dispute over the sale of ice to nonmembers is not, for constitutional purposes, a labor dispute.

2. In holding that a union of ice peddlers may be enjoined from seeking to protect itself against substandard, nonunion competition by obtaining agreements from employers that they will not sell ice to nonmembers of the union, because such agreements lessen the business of nonunion peddlers.

3. In holding that because peaceful picketing for the purpose of inducing an employer to refrain from selling goods to nonunionists results in lessening of the employer's business the picketing may constitutionally be enjoined.

4. In holding that the peaceful, truthful publication by a labor organization through picketing of the fact that a business enterprise sells goods to nonmembers of the union is not protected by the First and Fourteenth Amendments.

SUMMARY OF ARGUMENT.

I.

Peaceful picketing of an ice company for the purpose of inducing the company to cease selling ice to nonunion peddlers constitutes an exercise of the right to free speech. By selling ice to peddlers who refused to abide by working conditions established by the union for its members the company threatens the legitimate interests of all union members. The dispute between the Company and the union over sale of ice to nonunion peddlers is a "labor dispute" as that term has been defined for constitutional purposes by this Court. No state can constitutionally prohibit union members from publicizing their side of such a dispute near the premises of the ice company either by adopting a distorted view of "labor disputes" or by refusing to recognize the legitimacy of the union's grievance.

Peaceful picketing in labor disputes is indispensable to the exercise by workers and the public of the right to participate in the resolution of issues of vital economic importance to them. The fact that peaceful picketing may result in such active participation by union members and the public, far from constituting a reason for prohibiting picketing, is the very reason for its constitutional protection.

Neither economic injury to the business picketed, nor injury to the economic interests of nonunion workers, which may result from peaceful picketing by union members seeking to advance their legitimate economic interests may constitute justification for a prohibition of picketing.

II.

A state may not constitutionally apply common law concepts of restraint of trade in such fashion as to illegalize

the concerted efforts of workingmen to protect their legitimate economic interests in satisfactory wages, hours and working conditions. Peaceful picketing for such purposes is protected by the Constitution even though called a "conspiracy" or "tort." Restraint of trade concepts may not be utilized to narrow the constitutional boundary of labor disputes within which the right to peaceful picketing is protected by the First and Fourteenth Amendments.

A state may not, to protect the economic interests of nonunion peddlers, make it unlawful for an employer to acquiesce in union demands that he refrain from supplying goods to nonunion peddlers, nor may it prohibit peaceful picketing aimed at inducing an employer so to acquiesce. Neither economic injury resulting to employers from such picketing, nor economic injury to nonunion peddlers which results from refusal of employers to supply goods to them consitutes a substantive evil of such magnitude as to mark a limit to the right of free speech.

ARGUMENT.

I.

Peaceful picketing of a business which threatens the economic interests and wage standards of union members by sustaining their nonunion competitors is an exercise of the right to free speech protected by the First and Fourteenth Amendments against state abridgment.

This case presents another phase of the now familiar controversy over the unionization of "peddlers" or "vendors;" which, as it affected the milk business, this Court examined in *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, and *Milk Wagon Drivers' Union* v. *Meadowmoor Dairies*, 312 U. S. 287; and, as it affected the bakery products business, was examined in *Bakery & Pastry Drivers and Helpers* v. *Wohl*, 315 U. S. 769. Here, as in those cases, the legitimate grievances of the unionized peddlers, ice truck drivers and helpers, stem from the fact that nonunion peddlers undermine the standards of wages and working conditions which the union has achieved for its members.

Here, as in all of those cases, the union first in good faith solicited the nonunion peddlers to join the union. Here, as in those cases, the refusal of the nonmember peddlers to join forced the union, in self-defense, to seek to enlist the support of those whose patronage sustained the nonunion system. Here, as in the *Lake Valley* and *Wohl* cases, and unlike *Meadowmoor*, speech alone, uncoupled with violence, was resorted to. *As in the Wohl case*, 315 U. S. at p. 775:

> "The record in this case does not contain the slightest suggestion of embarrassment in the task of governance; there are no findings and no circumstances from which we can draw the inference that the publication was attended by violence, force or coercion, or conduct

otherwise unlawful or oppressive; and it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing."

The state found nothing unlawful in the action of the union members in soliciting the nonunion peddlers to join the union. What was found unlawful was the action taken by them against the ice company which distributes ice through nonunion peddlers. The state has here held that the union members may not, "in order to compel observance of established standards," *Meadowmoor case, supra*, 312 U. S. 287, 291, seek by peaceful picketing to enlist the support of an ice company which uses nonunion peddlers as outlets for its products. The sole object of the union in seeking to enlist the support of the ice company, like the sole object of the union in the *Lake Valley, Meadowmoor* and *Wohl* cases, was to induce nonunion peddlers to join the union and observe established working conditions.

In insulating appellee ice company from peaceful picketing the state has here done precisely what this Court held in the *Meadowmoor* and *Wohl* cases, that a state could not constitutionally do. In the *Meadowmoor* case the Court affirmed unequivocally the constitutional right of the union to take action in the form of peaceful picketing against dairies supplying goods to nonunion vendors (312 U. S. 287, 291, 297). It is true that in that case the action taken by the union against the dairies involved picketing at the retail stores which sold to the public the milk processed by the dairies, whereas in this case the union did not go so far as to picket the customers of the nonunion ice peddlers. But most assuredly it cannot seriously be claimed that although the union had a right to picket the customers of the vendors in the *Meadowmoor* case, in order to bring pressure on the dairy which supplied milk to the vendors,

it nevertheless did not have a right to bring pressure on the dairies directly by picketing at their own premises. Yet, incredibly, it is on this ground, and on this ground alone, that the court below attempted to distinguish the *Meadowmoor* case (R. 64).

The facts of the *Wohl* case leave no room even for this insubstantial distinction. For in the *Wohl* case the union picketed baking companies which supplied bread to nonunion peddlers precisely as the union here picketed the ice company which sold ice to nonunion peddlers. In fact, in the *Wohl* case, this was the only picketing ever actually engaged in. The state court, as did the court below here, enjoined the union "from picketing the places of business of manufacturing bakers who sell to the" nonunion peddlers "because of the fact that said manufacturing bakers sell" to such peddlers (315 U. S. at 773) (Cf. 315 U. S. 737, note 5), and this Court held that this injunction was an invasion of rights guaranteed the union by the Fourteenth Amendment. It is mockery, we submit, to say as did the court below, that the *Wohl* case is not controlling because "no baking companies were parties to that case" (R. 63), particularly when, in the *Meadowmoor* case, the plaintiff was the supplying dairy against which the picketing was ultimately directed.

The holdings of the court below that "there is no labor dispute as that term has been construed by court decisions between plaintiff and defendants," and that the union here abandoned "its legitimate sphere" by picketing the ice company (R. 62), likewise cannot be reconciled with decisions of this Court. In the *Lake Valley* case this Court specifically held that a dispute between a union of milk truck drivers on one side and dairies on the other, over the question whether the dairies would supply milk to nonunion drivers was a "labor dispute." "To say," noted the court, that this "was an issue unrelated to labor's efforts to im-

prove working conditions, is to shut one's eyes to the everyday elements of industrial strife." 311 U. S. 91, 99. The same issue, between the same parties, was held in the *Meadowmoor* case to give rise to a labor dispute. The court emphasized that but for the violence present in that case peaceful picketing for the purpose of interferring with the dairies' business could not constitutionally have been enjoined.

And in the Wohl case, where the New York courts applied the same distorted definition of "labor disputes" which the Supreme Court of Missouri adopted here, this Court made it clear that whatever object such a definition might serve for purposes of state law, it could not affect the constitutional right to engage in peaceful picketing which had as its ultimate object inducing nonunion peddlers to conform to union standards. "One need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter," 315 U. S. at p. 774. The grievance held by the union against the manufacturing bakers in the *Wohl* case was the very same grievance held by the union in this case against appellee. They supplied goods to nonunion vendors who threatened the union's established standards. The picketing enjoined by the New York Courts was picketing for the purpose of inducing them to cease doing so. This, the Court held, was a "labor matter," and the union could not constitutionally be prevented from peacefully publicizing its grievance at the premises of the supplier. That is all appellants did here. A picket walked back and forth before appellee's premises carrying a sign bearing the legend of the union's grievance, i. e., that appellee sold ice to nonunion vendors. If this activity constituted publication of the facts of a labor dispute in the *Wohl* case, we are at a loss to understand how it can be said in this case to involve no "labor dispute."

Only last March this Court again observed that "sale by a merchant of nonunion commodities is, no doubt, a traditional source of labor disputes." *Bakery Sales Drivers Union* v. *Wagshal*, 333 U. S. 437, 444. In the light of this Court's recognition in the *Lake Valley*, *Meadowmoor* and *Wohl* cases, that sale by a wholesale merchant of commodities to a nonunion retail vendor is also a traditional source of labor disputes it is clear that no valid distinction between the two situations can be drawn. Yet the court below did draw a distinction. It emphasized that because the employees employed in appellee's ice producing and storage business are union members "the ice which it sells is a union product, not a nonunion product" (R. 59). And it purported to distinguish the *Lake Valley* and *Meadowmoor* cases on the ground that the picketing was confined to the place of business of the peddler's customers—which, presumably in the court's view, was justified as a protest against sale by retail stores of nonunion goods. Why labor unions may have a legitimate grievance against a retailer who purchases goods from nonunion vendors but may not have a legitimate grievance against a wholesaler who supplies these goods to them, the court did not undertake to explain. Of course, if a state could ban peaceful picketing on the theory that sale of goods to nonunion peddlers does not give rise to a legitimate union grievance it could equally ban peaceful picketing on the theory that sale by a retailer of nonunion commodities does not give rise to a legitimate union grievance. The cases decided by this Court hold that a state may do neither.

That the court below attempted to distinguish the decisions of this Court upon such grounds as these demonstrates, we believe, that it misconceived the entire constitutional philosophy upon which those cases rest. To that philosophy, and its applicability to the facts of this case we now turn.

A. Publication of the facts of a labor dispute serves the objectives of the First Amendment by enabling those engaged in the industry and the public to play a part in the decision of issues of critical economic importance.

In *Thornhill* v. *Alabama*, 310 U. S. 88, 103, 104, this Court, explaining its invalidation of a state anti-picketing statute, stated:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. * * * It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the present generation and of those as yet unborn may depend upon these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. * * * Labor relations are not matters of mere local or private concern. Free discussion concerning conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem."

Publication of the facts of a labor dispute is thus sheltered by the First Amendment not merely because publication is an end in itself. It is protected because publication is indispensable if members of the industry in which the dispute arises and members of the public generally are to be able to exercise their fundamental liberties to shape their economic destiny. It is the legitimate interest of those

engaged in an industry in "satisfactory hours and wages and working conditions * * * and a bargaining position which makes these possible" which lies at the heart of the constitutional protection for picketing in labor disputes. That the public too has an interest which warrants placing before it the facts of a labor dispute so that it may, by granting or withholding its patronage, play a part in the resolution of the dispute between the contestants is the corollary holding of Thornhill's case.

Suppliers and customers of nonunion peddlers, and those who patronize such suppliers and customers, sustain the nonunionists in their refusal to abide by union wage standards. All have a vital interest in whether substandard wage practices should be permitted to continue. By continuing their patronage they sustain the nonunionists in their dispute with the union. By withdrawing it they assist the union to eliminate the threat to the wage standards of all engaged in the trade or occupation. If information concerning the dispute may not be conveyed to them they have no opportunity to determine whether by their patronage they are assisting in the perpetration of conditions of employment of which they may disapprove. That such information may not constitutionally be denied to them; that they may not be denied the opportunity to decide whether to continue or to cease patronizing and sustaining nonunion working conditions, was re-emphasized in the *Wohl* case. Explaining why the ban on picketing of the manufacturing bakers and the retailers could under no circumstances be permitted to stand, the court said (315 U. S. at p. 775):

> "(The nonunion peddlers') mobility and their insulation from the public as middlemen made it practically impossible for (the union drivers) to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated."

Since the purpose of protecting publication of the facts of a labor dispute is to enable members of the industry and the public to play a part in resolution of the dispute in order to protect their own vital interests, consistently with Thornhill's case, no state could be permitted to withdraw disputes affecting labor's efforts to improve working conditions from the area in which peaceful picketing could constitutionally be used. This is the holding of *American Federation of Labor* v. *Swing*, 312 U. S. 321. In that case

> "A union engaged in what the record describes as beauty work unsuccessfully tried to unionize Swing's beauty parlor. Picketing of the shop followed. To enjoin this interference with his business, and with the freedom of his workers not to join a union, Swing and his employees began the present suit" (312 U. S. at 323).

The Illinois courts sustained the suit on the theory that since there was no labor dispute between Swing and his employees, the union had no legitimate interest in picketing Swing's place of business. Illinois law was declared to be "that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him" (312 U. S. at 325). This Court held the Illinois law, as so applied, unconstitutional. It said (312 U. S. at p. 326):

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limit of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small

as to contain only an employer and those directly employed by him. The economic interdependence of all engaged in the same industry has become a commonplace. *American Steel Foundries* v. *Tri-City Central Trades Council* (257 U. S. 184). The right of free communication cannot therefore be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute deemed by them to be relevant to their interests can no more be barred by concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case."

The dispute involved in the *Swing* case was a dispute over unionization. Illinois had declared, in effect, that in such a dispute it was unlawful for union members to attempt to gain their objective by urging the public to refrain from patronizing the nonunion enterprise. Illinois thus attempted to protect the economic interests of the nonunion employer and nonunion employees against the consequences of action taken by union members and the public for the purpose of inducing the employer and his employees to join the union. Citing the *Tri-Cities* case this Court held that the interests of employers in eliminating nonunion competition in the industry was so vital, that under the Constitution they could not be precluded from pursuing that objective by the methods there used.

In the *Tri-Cities* case, as in *Holden* v. *Hardy*, 169 U. S. 366, 397, this Court recognized that effective competition between employees and employers for shares of the products of industry is possible only through united action by employees. "Union was essential to give laborers opportunity to deal on equality with their employer" (257 U. S. at 209). Because it was essential, and because no state could consistently with the Thirteenth Amendment, erect

barriers to prevent employees from obtaining equality of bargaining power with employers, this Court recognized the right of employees to form labor unions, embracing all engaged in a single trade or industry, which, by eliminating the competition of nonunion employees, could attain for employees in the industry, vis-a-vis employers, that equality of bargaining power which distinguishes the status of a worker in a free society.

The *Tri-Cities* case also recognized that the concerted refusal of workers in an industry to work or to deal with an employer for the purpose of inducing him to grant improved wages, hours or working conditions or to refrain from conduct which would weaken their bargaining position was fundamental in a free society. Describing such action the Court said:

> "They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth * * *. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital."

It is universally recognized that union standards cannot be maintained if some employees in the industry are permitted to work at lower standards. (*Apex Hosiery Co. v. Leader*, 310 U. S. 469, 503). It is the doctrine of the *Tri-Cities* case as applied in the *Swing* case, that no state can prevent labor unions from seeking to preserve and protect the standards they have achieved by picketing those who engage in and foster substandard wage competition.

Where a state prohibits such picketing it deprives union members and the public of power to use their influence to improve wages, hours, working conditions and the bargaining power of employees, a denial which negates the principles not alone of the First Amendment but of the Thirteenth and Fourteenth as well.

Ignoring this fact, Shasta County, California, imposed the ban on peaceful picketing which was invalidated in *Carlson's* case, 310 U. S. 106, 112. The court there said:

> "It is true that the ordinance requires proof of a purpose to persuade others not to buy merchandise or perform services. Such a purpose could be found in the case of nearly every person engaged in publicizing the facts of a labor dispute; every employee or member of a union who engaged in such activity in the vicinity of a place of business could be found desirous of accomplishing such objectives; disinterested persons (who might be hired to carry signs) appear to be a possible, but unlikely, exception. In brief, the ordinance * * * proscribes the carrying of signs only if by persons directly interested who approach the vicinity of a labor dispute to convey information about a dispute."

The opportunity of the public and of union members to be informed of the facts of a labor dispute so that they may take such action, far from being an excuse for invalidating picketing, is thus one of the basic justifications for its constitutional protection.

B. Neither ice companies which distribute ice through nonunion peddlers, nor such peddlers themselves, may constitutionally be exempted from the consequences of peaceful picketing by union members aimed at inducing adherence to union working standards.

In this case, as in the *Swing* case, the state had attempted to draw "the circle of economic competition

between employers and workers so small as to contain only an employer and those directly employed by him." Missouri, like Illinois, has banned peaceful picketing at the premises of an employer who supports nonunion workers in their competition with union workers. Missouri, like Illinois, has imposed the ban as a result of ignoring the fundamental economic interests of union workers and the public in the maintenance of fair standards of wages and working conditions. Missouri, like Illinois, has imposed the ban to protect the business interests of the employer and those of the nonunion workers against the consequences of peaceful picketing. If the right to free communication is not to be mutilated that ban cannot be permitted to stand.

It is true, of course, as this Court has always recognized, that peaceful picketing in dispute over unionization results in injury to the business of the enterprise picketed, and that to avoid such injury the business involved may comply with the union's demands and thereby injure the economic interests of the nonunion employee. But, because the resultant injury to the nonunion employee is not an end in itself, but merely a means to the union's legitimate end of preserving its standards of wages and working conditions, this Court has refused to permit "concern for the economic interests against which (unionists) are seeking to enlist public opinion" to serve as justification for prohibiting peaceful picketing. *Swing* case, *supra*. As noted above, the economic interests which the state sought to shelter in the *Swing* case, were precisely those which Missouri seeks to shelter here, i. e., those of the employer and the nonunion workers.

In *Thornhill's* case, 310 U. S. 88, 104, the court pointed out that picketing

> "may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests * * *. The danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in Section 3448."

In the *Wohl* case, again as here, the state was seeking to protect the economic interests of nonunion peddlers against the consequences of picketing their suppliers and customers. Of course, if the picketing was successful the suppliers and customers would cease doing business with the nonunion peddlers unless and until they agreed to observe union standards of working conditions. The New York courts believed that the objective of the union—to induce the suppliers and customers to refrain from patronizing those peddlers who refused to hire an employee at nine dollars a day for one day a week—was not a legitimate goal of the union. This Court held, however, that whatever the state's views as to the legitimacy of economic standards which it sought to induce nonunion peddlers to accept and no matter what view the New York courts took of the "coercive" effect of the potential withdrawal of patronage from the peddlers by suppliers and customers as a result of the picketing, "We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which petitioners sought to exercise." 315 U. S. at 774-775. And, the Court took pains to point out that it was not the state's province to decide whether the grievances of the union mem-

bers were "legitimate" for despite the state's view that they were not, this Court described the grievances as "legitimate" (315 U. S. at 775).

In sum, the cases hold that the interests of union members and the public in disputes over the extension of unionization and preservation of decent standards of wages and working conditions are of so fundamental a character that no state may prevent union members from seeking to advance their interests in such disputes through peaceful picketing. Limitations upon peaceful picketing based upon disregard of these fundamental legitimate interests of union members must automatically fall. And this is true whether a state, blinding itself to realities, chooses to regard as unrelated to labor's legitimate economic interests its efforts to induce employers to cease distributing goods through nonunion peddlers; or whether, disregarding the economic interdependence of all engaged in the same industry, it refuses to recognize that such an employer is the union's adversary in a labor dispute.[1] Moreover, no state can prohibit peaceful picketing because of its economic consequences to the picketed enterprise or its nonunion patrons or employees.

The opinion of the court below is utterly incompatible with these holdings. To say, as did the court below (R. 62), that the dispute between appellants and appellee ice company over the sale of ice to nonunion peddlers is not a "labor dispute" is to fly in the face of the holdings in the *Lake Valley*, *Meadowmoor* and *Wohl* cases. To confine the definition of "labor disputes"[2] as did the court below (R. 62), to disputes between an employer and his own employees is to disregard the economic interdependence

[1] Compare with the *Lake Valley*, *Meadowmoor*, *Swing* and *Wohl* cases, *supra*, the statement in *Carpenters and Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722, 810; where Plaster, a contractor who employed nonunion carpenters, was described as the "real adversary" of the carpenter's union.

of all engaged in the same industry as flagrantly as did Illinois in the *Swing* case. To say, as did that court, that in seeking to induce appellee to stop selling ice to nonunion peddlers the union has abandoned its "legitimate sphere of collective bargaining and other properly related dealings with its employers" is to ignore the fact that this very conduct was held to be legitimate union activity in the *Lake Valley*, *Meadowmoor* and *Wohl* cases. To hold, as did the court below (R. 60, 62), that the picketing was unlawful because it interfered with appellee's business is to ignore the holdings of this Court in the *Thornhill*, *Carlson*, *Swing* and *Meadowmoor* cases.[2]

These are the findings, each of them fallacious, upon which the court below predicated its conclusion that the Missouri anti-trust statute could constitutionally be applied to the picketing in this case; that the Union's "grievance" against appellee resulting from its continued sale of ice to nonunion peddlers could be characterized as "unlawful," and that the union could by law be prevented from obtaining agreements with employers that they will not sell ice to peddlers who refuse to abide by union standards (R. 62-63).

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[2]To the extent that the court below relied upon the fact that not only appellee's ice business but its storage business, which was conducted on the same premises, was injured as a result of the picketing and consequent refusal of drivers to patronize appellee's business, the court ignored the holding of the *Wohl* case. There, where the union proposed to picket the retail stores which sold bread delivered by nonunion peddlers, the effect of the picketing if successful, would clearly have been to deprive the stores of the patronage of consumers sympathetic to the union not only with respect to the bread but also all other items sold by the stores. The *Wohl* case holds as Mr. Justice Reed commented in his dissenting opinion in the *Ritter* case, 315 U. S. at 737-738, that although "the selling of baked products, distributed by the peddlers is a minor part of the grocery business" a state may not on that account shield groceries which purchase bread from nonunion peddlers from peaceful picketing. Moreover, the economic consequences of the picketing in this case flow from the conduct of truck drivers, employees who are engaged in the very trade involved in the dispute. They, if anyone, have a right to refuse to patronize their adversaries in the dispute, and certainly the consequences of their refusal to patronize cannot, consistently with the cases discussed above, be deemed an excuse for prohibiting their fellow workers from advising them of the dispute.

Since it is clear that the picketing engaged in by appellants in this case was an exercise of the right to free speech guaranteed by the First Amendment which could not be enjoined because of either the state's "notion * * * regarding the wise limits of an injunction in an industrial dispute" (*Swing* case, *supra*), or because of its notion regarding the type of issues between employers and workers which are "labor disputes" (*Wohl* case, *supra*), or because of the state's desire to shield the economic interests of employers and workers from the economic consequences of peaceful picketing (*Swing*, *Wohl* and *Thornhill*, cases, *supra*), we turn to the sole remaining question, i. e., whether the state's notion that the object and effects of the picketing violate the policy of its anti-trust law serves to remove the picketing from the sphere of constitutional protection.

II.

Publication of the facts of a labor dispute by peaceful picketing may not constitutionally be enjoined merely because a state chooses to regard the consequences of such picketing as restraint of trade.

In this case the Missouri court held that the agreement of the union drivers to marshal public opinion against the practice of distributing ice through nonunion peddlers was illegal because it tended to injure appellee's business and that of the nonunion peddlers by discouraging trade. Violence aside, it was on this theory that Illinois attempted to illegalize picketing in the *Meadowmoor* case. There, but for the violence, this Court would clearly have held the injunction invalid. Undisputed by the majority was Mr. Justice Black's statement in his dissenting opinion (312 U. S. at 305) that:

> "Illinois cannot, without nullifying constitutional guarantees, make it illegal to marshal public opinion against these general business practices. An agreement so to marshal public opinion is protected by the Constitution even though called a 'common law' conspiracy or a 'common law' tort. Despite invidious names, it is still nothing more than an attempt to persuade people that they should look with favor upon one side of a public controversy."

The attempt of Missouri in this case to apply general "restraint of trade" concepts to the action of the union members in publicizing their dispute with the nonunion ice peddlers and the ice company which supports them is similarly an attempt to defeat the exercise of constitutional rights by applying to such exercise an "invidious name."

In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 503, this Court recognized that if common law or statutory policies against combinations in restraint of trade could be applied to the efforts of labor unions acting in concert to maintain and preserve decent standards of wages and working conditions the constitutional right of employees to self-organization for purposes of collective bargaining would be completely nullified. He pointed out that:

> "successful union activity, as for example consummation of a wage agreement with employers, may have some influence in price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from nonunion made goods, see *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209, an elimination of price competition based on differences in labor standards is the objective of any national labor organization."

In *United States* v. *Hutcheson*, 312 U. S. 219, where the Sherman Act was invoked as a basis for outlawing peaceful picketing which was an outgrowth of a jurisdictional dispute, the late Mr. Chief Justice Stone took occasion to point out (312 U. S. at 243) that:

> "the publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the employee not to patronize him is an exercise of the right of free speach guaranteed by the First Amendment which cannot be made unlawful by act of Congress."

We believe, therefore, that it is perfectly clear that a state may not apply either statutory or common law policies concerning restraint of trade to illegalize combinations among workingmen for the purpose of eliminating wage competition throughout a trade or industry. Nor may a state on any such grounds, prohibit workingmen from either obtaining agreements with employers pursuant to which wage competition is eliminated, or from seeking by the peaceful means of refusing to work, refusing to patronize and giving publicity to disputes to induce employers to enter into such agreements.

Virtually all peaceful picketing, as this Court recognized in the *Carlson* case, *supra*, results from combined action of individuals and has for its immediate object restraint of the business picketed. Moreover, virtually all picketing where disputes over unionization are involved has for its ultimate object elimination of competition over wages and working conditions. If either of these facts could serve as a valid basis for inhibition of picketing then peaceful picketing in the *Swing*, *Meadowmoor*, *Wohl*, *Thornhill*, *Carlson*, and other cases could constitutionally have been enjoined.

If a state could prohibit peaceful picketing merely because the state regards resultant interference with the business picketed as "restraint of trade" it could equally well enjoin peaceful picketing because it might regard the resultant interference as an unjustified interference with the property rights of the business enterprises.

Certainly the right to do business without unwarranted interference has value, and if, as the cases hold, a state may not protect the right to do business against peaceful publication of the facts of a labor dispute the reason lies not in the fact that one excuse for the prohibition may be less weighty than another, but rather in the fact that the Constitution prohibits the states from acting in the view that the interests of the unions which they seek to vindicate by picketing are not "legitimate" or do not justify the resultant interference.

The holding of this Court in *Carpenters and Joiners Union v. Ritter's Cafe*, 315 U. S. 722, lends additional weight to our view that when a state seeks to invoke statutory anti-trust or restraint of trade policies as a justification for prohibiting peaceful picketing the constitutional issue turns not on the question whether the consequences of the picketing restrain trade or tend to eliminate competition between union and nonunion men, but solely on whether, in this Court's view, the picketing is an outgrowth of a labor dispute in which the participants are economically concerned.

In that case Ritter contracted with Plaster, a nonunion contractor, for the erection of a building. Plaster employed nonunion carpenters and painters on the construction project. Carpeters and Joiners Union of America, aggrieved by this action, attempted to induce Ritter to require Plaster to employ union rather than nonunion carpenters by picketing a cafe owned by Ritter which was situated a mile and

a half from the construction project. Holding that the picketing of Ritter's Cafe constituted a violation of its anti-trust law, Texas enjoined the picketing. Although Texas had invoked its anti-trust statute, this Court laid no emphasis whatever on this fact. The issue, said the Court, is whether Texas may constitutionally insulate from the dispute arising over working conditions at the construction project "an establishment which industrially has no connection with the dispute," 315 U. S. 727. It was the absence of any industrial connection whatever between the restaurant business and the construction project—not the fact that Texas had relied upon its anti-trust statute rather than some other ground—which justified the restriction on picketing in that case. The court made this abundantly clear not only by reaffirmation in that case of the rule of the *Wohl* case (315 U. S. at 727), but also by its emphasis upon the fact that "Texas has not attempted to protect other business enterprises of the building contractor, Plaster, who is (the union's) real adversary" (*ibid*).

Here Missouri has attempted to accomplish through its anti-trust statute precisely what this Court said in the *Ritter* case Texas could not constitutionally accomplish through its anti-trust statute in the *Ritter* case. It has attempted to exempt from the economic pressure of picketing the very economic enterprise which sustains nonunion peddlers and which is therefore, like Plaster, appellants' "real adversary" in the dispute over working conditions in the ice delivery business. The issue then is solely whether Missouri can, on any theory, impose a limitation upon speech where there exists "an interdependence of economic interest of all engaged in the same industry," and this issue turns upon whether Missouri can constitutionally exempt from the area of a labor dispute the very enterprise whose business activities give rise to the dispute. We submit that it cannot.

We do not mean to suggest, of course, all activities of labor unions must as a matter of constitutional law be wholly exempt from either statutory or common law policies against restraint of trade. Where labor unions utilize their powers for the purpose of suppressing competition among business men in respect to other matters than wages, hours, or working conditions, or if unions are used as instrumentalities for fixing prices, such policies may, without constitutional objection, be invoked against them. *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797; *United Brotherhood* v. *United States*, 330 U. S. 395. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 502, 504. What we do say is that a state may not, to serve its notions of public policy, exempt from the area of economic conflict such issues as satisfactory wages, hour, working conditions, and the bargaining power indispensable to their attainment, or treat the peaceful efforts of working men to attain these objectives as evils within the allowable area of state control. And, we say, that a state may not exempt a union's adversary in such a dispute over such issues from the consequences of peaceful picketing.

Nor do we mean to suggest that no issues between workers and employers which give rise to labor disputes may be made justiciable, and by substitution of process of justice, be removed from the area of economic conflict. As we read *Dorchy* v. *Kansas*, 272 U. S. 306, and *United States* v. *United Mine Workers*, 67 S. Ct. 677, they hold that a state may insist that clearly justiciable issues between organized workers and employers be decided through the judicial process provided by the state rather than through competition and the face of public opinion. The issues in those cases clearly lent themselves to judicial determination. Thus the issue in the *Dorchy* case was whether, under the law of the state, a workingman was entitled to back pay:

in the *Lewis* case, whether, under the law, a collective bargaining agreement had or had not expired. It could therefore be held an unlawful objective for the union to seek resolution of those issues by resort to the influence of public opinion rather than through the courts.

But the court below misreads these opinions if it assumes that they license a state court to outlaw resort to public opinion on issues of economic conflict in which organized workers have a substantial and legitimate concern merely by declaring that the objective which the workers seek to obtain is in its view unlawful, or that the employer cannot consistently with common law notions about restraint of trade comply with the union's demands. To permit state courts to outlaw peaceful picketing by such a technique would be to destroy the limitations upon state power which have been consistently maintained by this Court since Thornhill's case.

The court below has declared that it would be unlawful for appellee to agree with appellant to cease supplying ice to nonunion peddlers because it reads Section 8301 of the Missouri statutes as prohibiting any "combination for the purpose of refusing to sell to a certain person" and does not exempt such combinations where the refusal to sell is justified by the legitimate interests of the union members in preserving their standards of wages and working conditions, interests which could not be protected without such agreements.

The sole reason for so applying the statute in this case is to protect the economic interests of the nonunion peddlers in continuing to work for substandard wages and under substandard conditions, for only these interests could possibly be injured by the ice company's agreement not to sell to nonunion peddlers.

Because it holds that an agreement not to sell ice to nonunion peddlers would be illegal the court further held

that picketing to secure such an agreement is for an "unlawful objective" and may therefore be enjoined.

The reasoning of the court below is thus virtually identical with the reasoning of the New York Court in the *Wohl* case. There the court took the view that the refusal of bakers to supply goods to a nonunion peddler was illegal because it tended to "coerce" the peddler into hiring a helper. Picketing to induce bakers to refuse to supply bread to the peddler would therefore be for an "unlawful purpose" and on that theory enjoinable. This Court, after expressing doubt that such a rationale would even be offered by a state court as an excuse for limiting peaceful picketing in a case where the constitutional issue of free speech was raised and considered left no doubt that such reasoning could not warrant a ban. Neither the refusal of the baker to sell to the nonunion peddler, nor the inducement of others not to patronize bakers who persisted in such sales could constitutionally be deemed by the states to constitute "a substantial evil of such magnitude as to mark a limit to the right of free speech."

To hold that concern for the economic interests of the nonunion peddlers constitutes adequate justification for prohibiting suppliers from refusing to sell to them, or for prohibiting union members from picketing, reverses the doctrine of the *Swing* case that "concern for the economic interests against which they are seeking to enlist public opinion" cannot warrant prohibition of picketing.

If it could, a state would not have to go so far as to render it unlawful for an employer to refuse to supply goods to nonunionists in order to prohibit picketing for

the purpose of inducing him to do so. For the employer's interest in doing business with anyone he pleases is no less entitled to state protection than is the nonunionists' interest in being able to buy goods from particular sources. All picketing there could be barred on the theory that it constituted interference with the employer's business for the "unlawful purpose" of inducing him to run his business differently than he otherwise would. Cf. *Journeymen Tailors* v. *Miller*, 312 U. S. 658, reversing 15 Alt. (2d) 822, 823.

By such a device as this the state could withdraw from the area of public discussion all issues of economic concern to workers and to the public, and, by denying to them an opportunity to become informed of the issues, make it impossible for them to participate in the shaping of their economic destiny. But this device falls far short of the standards required by this Court where limitations are imposed upon freedom of speech.

Limitations upon freedom of speech are permissible, at best, only where the substantive evil to which the speech curtailed may give rise is "extremely serious." *Bridges* v. *California*, 314 U. S. 252. This Court has unequivocally stated time and time again that injury which results to industrial concerns and to nonunion workers as a result of peaceful picketing in labor disputes is not a substantive evil of such magnitude as to warrant prohibition of picketing. See, e. g., *Thornhill*, *Carlson*, *Wohl* and *Swing* cases *supra*. That the picketing enjoined here will give rise to evils of another character than this is not even suggested

by the state. It follows that the ban upon picketing imposed here cannot be permitted to stand.

Conclusion.

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

CLIF LANGSDALE,
Attorney for Appellants.

Address of Attorney:
922 Scarritt Building,
Kansas City, Missouri.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 182

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, ET AL.,

Appellants,

vs.

EMPIRE STORAGE AND ICE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

RICHARD K. PHELPS,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

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EMPIRE STORAGE AND ICE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS THE APPEAL OR TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF MISSOURI.

Empire Storage and Ice Company, a Corporation, Appellee herein, submits the following statement in answer to the jurisdictional statement heretofore filed by the Appellants:

The statement filed by the Appellants does not accurately present the issues decided by the Supreme Court of Missouri, en Banc, in its unanimous opinion. It is, therefore,

considered necessary to outline briefly the facts upon which that Court's opinion is based.

The Appellee is engaged in the manufacture and sale of ice and in the storage of perishable provisions. The Appellants are members and or officers of the Ice and Coal Drivers and Handlers Local Union No. 953. None of the Appellee's employees were members of that union and none of the Appellants represented any of the Appellee's employees. There was not at any time involved in this action any labor dispute of any kind between the Appellee and its employees.

I

The case arose out of the picketing of the Appellee's premises by the Appellants. This picketing resulted in the curtailment of eighty-five (85%) percent of the Appellee's business. The Appellee's plant was completely unionized and there was no dispute between Appellee and its employees.

The Appellants admitted in their testimony in the trial Court that their purpose in picketing was to coerce Appellee to refuse to sell ice to ice peddlers who were not members of Appellants' union. The effect of their picketing was virtually to destroy the business of the Appellee and to bring about destruction of great quantities of perishable commodities. The trial Court held that this purpose was unlawful and that the conduct of Appellants resulted from and was a part of an unlawful combination in restraint of trade in violation of Section 8301 of the Statutes of the State of Missouri. The Supreme Court of Missouri affirmed the trial Court's injunction.

There was no issue of the facts as to the purpose of the picketing. As stated in the opinion of the Supreme Court of Missouri (210 S. W. 2d 55, L. C. 57):

> "The admitted purpose of defendant's picketing is clearly in violation of Section 8301. Defendant Jenkins

testified his union had made agreements with the other ice companies of Kansas City under which the companies agreed not to sell ice to non union peddlers. By their picketing defendants were attempting to force plaintiff to become a party to such combination. A combination for the purpose of refusing to sell to a certain person or persons is in direct violation of Section 8301. . . . . "

And again:

"Inasmuch as defendants were attempting through its picket line to force plaintiff into a combination which had the concerted purpose of preventing the sale of ice to non-union peddlers, and thus require it to make unlawful discrimination in its sale of ice, it follows that the purpose of the picketing was unlawful."

Notwithstanding the above determination by the Supreme Court of Missouri, the Appellants persist in asserting that the purpose of the picketing was lawful. It is submitted that the decision of the Supreme Court of Missouri construing and applying a statute of the State of Missouri is conclusive and is not reviewable by the Supreme Court of the United States. (*Hotel and Restaurant Employees International Alliance* v. *Wisconsin Employment Relations Board*, 315 U. S. 437, 86 Law. Ed. 946; *Sara Prince* v. *Commonwealth of Massachusetts*, 321 U. S. 158, 88 L. Ed. 645; *Reconstruction Finance Corporation* v. *County of Beaver, Pennsylvania*, 328 U. S. 204, 90 L. Ed. 1172.)

II

The only remaining theory upon which the Appellants base their appeal to the Supreme Court of the United States is that the state statute as construed and applied by the Supreme Court of Missouri is repugnant to the Constitution of the United States. The Appellants' presentation of this issue in their statement of the case and jurisdictional

statement, is somewhat misleading in that it assumes throughout that the purpose of the picketing was lawful. As noted above, the question of the lawful or unlawful character of Appellants' conduct has been finally determined adversely to the Appellants.

III

The decision of the Supreme Court of Missouri is in accord with the controlling decisions of the Supreme Court of the United States and, therefore, the record does not present a substantial federal question.

Contrary to the express language of the cases they have cited, Appellants again rely upon the untenable proposition that the First and Fourteenth Amendments to the Constitution of the United States preclude any curtailment whatsoever of so-called "peaceful picketing."

The Supreme Court of the United States has declared repeatedly that "The right of free speech is not absolute at all times and under all circumstances" (*Chaplinsky v. New Hampshire*, 315 U. S. 568; 86 L. Ed. 1031).

In *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl*, (315 U. S. 769, 86 L. Ed. 1178), it was held that "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual." The cases of *Thornhill v. Alabama*, 310 U. S. 88, 84 L. Ed. 1093; *Carlson v. California*, 310 U. S. 106, 84 L. Ed. 1104; *American Federation of Labor v. Swing*, 312 U. S. 321, 85 L. Ed. 855 and *Cafeteria Employees Union v. Angelos*, 320 U. S. 293, 88 L. Ed. 59, do not hold that peaceful picketing under any and all circumstances is absolutely protected by the guaranty of freedom of speech.

The right of the several States to place reasonable restrictions upon picketing cannot seriously be challenged under the controlling decisions of the Supreme Court of the United States.

An examination of the record in the instant case discloses that the conduct of the Appellants clearly violated the criminal laws of the State of Missouri. In the case of *Senn v. Tile Layers' Protective Union*, 301 U. S. 468, 81 L. Ed. 1229, Mr. Justice Brandeis stated that the picketing permitted by the Wisconsin statute there involved "must be peaceful; and that term as used implies not only the absence of violence, *but absence of any unlawful act.*". (Emphasis ours.) In that case the Court pointed out that "There was no effort to induce Senn to do an unlawful thing."

The case of *Carpenters Union v. Ritter's Cafe*, 315 U. S. 722, 86 L. Ed. 1143, clearly affirms the sovereign powers of the States to limit peaceful picketing. In this case the Court expressly recognized the principle that picketing for a purpose declared to be unlawful by State Statute may be enjoined. The final paragraph of the majority opinion sums up the basis for the Court's decision in a manner which we believe to be controlling in the case at bar:

> "It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law."

In the instant case the Appellants' picketing was for the purpose of coercing Appellee to refrain from selling ice to independent peddlers. Under the statutory laws of Missouri, and the opinion of its highest Court, this must be considered an unlawful combination in restraint of trade.

Appellants would have the Court believe that the trial Court's injunction was to prevent a threatened or potential danger to the public. To the contrary, the evil in this case was present and operative. Appellee's business was virtually halted. Large amounts of perishable merchandise belonging to others was in imminent danger of spoilage. The property of neutrals was being destroyed. It is difficult

to imagine a more acute case of clear, present and imminent danger to the public.

IV

The decision of the trial Court affirmed by the Missouri Supreme Court does not prohibit peaceful picketing for a lawful purpose and so does not abridge any constitutional guaranty of free speech.

The above proposition is clearly stated in the opinion of the Court, (210, S. W. 2d, L. C. 58):

> "The decree in this case forbidding picketing by defendants forbade only the picketing about plaintiff's premises. We affirm the decree. There is nothing in the decree which restrains defendants from informing the public of any labor dispute they may have with the peddlers by any lawful means of dissemination of information, including picketing, wherever the same may be proper. Under these circumstances we hold the decree does not contravene defendants' right of free speech under the Federal or State Constitutions."

Based upon the admitted facts in the case and the principles of law which are controlling, it is urged that:

1. The decision of the Supreme Court of Missouri is conclusive as to the construction and application of the statute of Missouri.

2. There remains no substantial Federal question which has not been previously decided by the Supreme Court of the United States.

For the reasons stated herein, Appellee submits that the Supreme Court of the United States should not accept jurisdiction of this case.

Appellee, therefore, respectfully moves the Court for an order dismissing the appeal or in the alternative for an

order affirming the judgment of the Supreme Court of Missouri.

Respectfully submitted,

GAGE, HILLIX & PHELPS,
RICHARD S. PHELPS,
By PERRY T. DUGGAN,
Counsel for Appellee.

(7804)

No. 182.

In the Supreme Court of the United States

October Term, 1948.

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UPTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953, *Appellants*,

vs.

EMPIRE STORAGE AND ICE COMPANY, a Corporation, *Appellee*.

BRIEF FOR APPELLEE.

RICHARD K. PHILLIPS,
JERRY T. DUGGAN,
GAGE, HILLIX & PHILLIPS,
1009 Bryant Building,
Kansas City, Missouri,
Attorneys for Appellee.

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vs.

EMPIRE STORAGE AND ICE COMPANY, a Corporation, *Appellee*.

BRIEF FOR APPELLEE.

No. 182.

STATEMENT.

The statement made by appellants is not in all respects consistent with the facts upon which the decision of the Supreme Court of Missouri is based. It is to be emphasized that the nonunion ice peddlers, whom the union sought to organize, are in fact independent businessmen and that the only relationship between the appellee and the peddlers is that of manufacturer and customer. Appellee had no control whatsoever over the ice peddlers, and there is no history of employment of ice deliverymen by the appellee.

The Court's attention is directed to the fact that all of appellee's employees are union members, and the product produced by the appellee is a union product. As pointed out by the Missouri Supreme Court in its opinion (210 S. W. (2d) 55, 57), there was no dispute between the appellee and its employees.

In addition to restricting appellee's business to the extent of 85 per cent, the withdrawal of transportation service from appellee's establishment endangered quantities of perishable commodities, principally foodstuffs, owned by various customers of appellee in the metropolitan area of Kansas City. The picketing carried on by the appellants interfered with the business of persons who were complete neutrals in the dispute between the appellants and the ice peddlers.

In their statement appellants again assert that the purpose of their picketing was lawful. This assertion is contrary to the determination of the Supreme Court of Missouri, which was based upon admissions made by appellants in their testimony in the trial court. In this testimony (R., p. 39) appellant Jenkins admitted that the purpose of the picketing was to curtail appellee's business. The Court's attention is directed to the fact that the appellee was faced with an impossible alternative. It could accede to the demands of the union and become a party to the appellants' unlawful combination, or it could stand by and permit destruction of its business and the destruction of the property of its customers.

The opinion of the Missouri Supreme Court was based upon the single ground that the conduct of the appellants violated the criminal law of the state, and, therefore, was not entitled to the protection of the constitutional provisions upon which the appellants rely.

ARGUMENT.

I.

The unlawful conduct of appellants cannot be considered an exercise of the right of free speech protected by the Constitution.

A. It is within the power of the State to enact and enforce reasonable restrictions upon picketing.

The appellants are here contending that a state is powerless to limit peaceful picketing. Not one of the cases cited by the appellants sustain that proposition. The Meadowmoor Dairies case (*Milk Wagon Drivers* v. *Meadowmoor Dairies*, 312 U. S. 287), cited by the appellants, expressly recognizes the authority of the state to restrain peaceful picketing under certain circumstances. While it is true that there was no violence or threat of violence in the instant case, and the case, therefore, may be distinguished from the Meadowmoor case, the latter case does not foreclose the right of the state to regulate peaceful picketing.

Missouri's highest court has frequently held (see *Lohse Patent Door Company* v. *Fuelle*, 215 Mo 421, 114 S. W. 997; *Hughes* v. *Motion Picture Machine Operators*, 282 Mo. 304; 221 S. W. 95; and *Rogers* v. *Poteet, et al.*, 355 Mo. 986; 199 S. W. (2d) 378) that the destruction of property and property rights in contracts by conduct identical with that of the appellants in this case is both a form of violence and of threats of violence as truly as are destructive physical acts, and as such, is within the interdiction of the state anti-trust laws and without the constitutional guarantee of the First Amendment.

The Lake Valley case (*Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91) turns solely

upon the application of the Norris-LaGuardia Act to injunction suits in Federal courts. As pointed out in the decision of the Missouri Supreme Court in the case of *Rogers* v. *Poteet, et al., supra*, the courts of the State of Missouri are not limited by legislation such as the Norris-LaGuardia Act.

Contrary to the appellants' contention, the very cases cited in appellants' brief establish definitely that a state may impose limitations upon the right to engage in peaceful picketing. In the Wohl case (*Bakery and Pastry Drivers and Helpers* v. *Wohl*, 315 U. S. 769) this Court said:

> "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."

In *Carpenters' and Joiners' Union* v. *Ritter's Cafe* (315 U. S. 722, l. c. 725) this Court stated:

> "The right of the state to determine whether or not the common interest is best served by imposing some restriction upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted."

In *Thornhill* v. *Alabama* (310 U. S. 88, l. c. 103) the Court said:

> "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the state to set the limits of permissible contest open to industrial combatants."

It is submitted that, on the basis of repeated assertions by this Court, there can no longer be any doubt as to the state's power to regulate even peaceful picketing.

B. Picketing, though not characterized by physical violence, nevertheless may be enjoined if it is unlawful or coercive.

In the instant case the courts of Missouri found that the picketing conducted by the appellants was part of an unlawful conspiracy in restraint of trade in violation of Section 8301 of the Statutes of the State of Missouri. The Court found that the purpose of such picketing was unlawful and that the appellants attempted to coerce the appellee to become a part of their unlawful conspiracy. When the appellee refused to violate the law, the union proceeded to destroy its business. The property of appellee and the property of its customers, all neutrals in the dispute between the union and the nonunion ice peddlers, was threatened with destruction just as certainly as though there had been threats of overt acts of violence against the property. Both appellee and its customers were neutrals in the dispute between the union and the nonunion ice peddlers. Instead of destroying the property by violence the union employed a subtler but no less effective method—the withdrawal of local transportation service. But for the injunction perishable commodities would have been destroyed. The mere absence of physical violence does not purge the conduct of appellants of its illegality. The portion of the Court's opinion in the Wohl case, *supra*, quoted by appellants on page 12 of their brief, suggests that picketing attended by any of the following:

> "violence, force, or coercion, or conduct otherwise unlawful or oppressive"

is beyond the protection of the constitutional provisions relied upon by the appellants.

Recognition of the principle that peaceful picketing may be enjoined if its purpose is contrary to statutory law is found in the recent case of *United Brotherhood of Carpenters and Joiners* v. *Sperry*, decided by the United States Court of Appeals, 10th Circuit, Case Number 3654, September term, 1948 (not yet reported). This case was a mandatory injunction action under Section 10(1) of the Taft-Hartley Act. The Regional Director of the N. L. R. B. applied to the District Court for an injunction restraining the union from picketing and other acts which violated Section 8(b) (4)(A) of the Act. The union defended on the ground that the use of "we do not patronize" lists and peaceful picketing were protected by the First Amendment to the Constitution of the United States. In affirming the decree of the District Court granting the injunction, the Court of Appeals said:

> "The further contention is that the use of the 'we do not patronize' lists and the peaceful picketing of the Klassen premises were protected by the First Amendment to the Constitution of the United States and by Section 8(c) of the Act. The pertinent part of the First Amendment guarantees freedom of speech and press, and Section 8(c) provides that expressions of views or opinions shall not constitute an unfair labor practice under the Act if they do not contain any threat of reprisal, or force, or promise of benefit. The promulgation and circulation of a blacklist and the peaceful picketing of premises in the course of a labor dispute may constitute a phase of the constitutional right of free utterance, if the blacklist is confined to the name of the employer *primarily* involved in the controversy and the picketing is confined to the premises of such employer. *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *American Federation of Labor* v. *Swing*, 312 U. S. 321; *Bakery Drivers Local* v. *Wohl*, 315 U. S. 769; *Thomas* v. *Collins*, *supra*. But

the guaranty of free speech and free press contained in the First Amendment does not compel the United States to tolerate in all places and under all circumstances even peaceful picketing, if it has harmful effect upon interstate commerce. The constitutional right of free speech and free press postulates the authority of Congress to enact legislation reasonably adapted to the protection of interstate commerce against harmful encroachments arising out of secondary boycotts. The promulgation and circulation of a blacklist and the picketing of premises as the means of waging a secondary boycott *which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment or Section 8(c) of the Act.* Concretely, *neither the constitutional nor statutory provision protected appellants* in their blacklisting of Klassen and their picketing of its premises as a means of *waging a secondary boycott against that company, with substantially harmful effect upon interstate commerce. Cf. Carpenters' and Joiners' Union of America* v. *Ritter's Cafe, supra.*" (Emphasis supplied.)

In the above case a federal statute limiting peaceful picketing in instances in which such picketing constitutes an unlawful restraint of commerce was found to be within the proper sphere of Congressional regulation and not invalid as contrary to the Constitutional guaranty of freedom of speech. The picketing enjoined in the instant case was also *secondary* and would also violate the provisions of the Taft-Hartley Act involved in the Sperry case. The restraint on peaceful picketing is no greater in this case. The state statute here enforced by the state courts is directed toward the elimination of the same evil involved in the Sperry case—restraint of commerce and trade. The fact that a state, rather than a federal statute, is involved

does not alter the fundamental constitutional principles with which this Court is concerned.

C. The restraint of commerce and trade may be enjoined whether or not a labor dispute is involved.

The case of *Columbia River Packers Association, Inc. v. Hinton*, 315 U. S. 143, is in many respects analogous to the situation considered by the Supreme Court of Missouri in the instant case. In the Columbia River Packers case the union by-laws prohibited union members from selling fish "outside the union agreements." The union agreements required buyers to agree not to purchase fish from fishermen who were not members of the union. The petitioner refused to so agree, and as a result the union, through its monopoly of the fish supply, precluded petitioner from purchasing fish. The District Court, holding that the case did not grow out of a labor dispute and that the respondents had violated the Sherman Act, issued the injunction which the petitioner sought. The District Court was reversed by the Circuit Court of Appeals, and this Court in turn reversed the Circuit Court of Appeals.

Obviously the efforts of the union in the Columbia River Packers case were directed toward improving or protecting the economic position of the union members. The union cut off the petitioner's supply of fish because the petitioner insisted on reserving the right to purchase from nonunion fishermen. In the instant case the union objected to the sale of ice by the appellee to customers who were not members of the union. To force appellee to cease doing business with nonunion members, the union's monopoly on local transportation service was used to halt appellee's business.

Just as the union's method in the Columbia River Packers case violated federal anti-trust legislation, the union's conduct here considered violates state anti-trust legislation.

Since there is no state law in Missouri corresponding to the Norris-LaGuardia Act and since the latter Act applies only to federal courts, the question of whether or not there is a labor dispute is not important in this case. The all-important and basic fact is that the appellants violated the criminal law of the State of Missouri.

In the Wohl case, *supra*, the decision of the State court was based upon a determination that there was no labor dispute. The Supreme Court of Missouri does not base its decision in this case upon the existence or nonexistence of a labor dispute. The Court, in fact, quotes from the opinion of this Court in the Wohl case as follows:

> "Of course, that does not follow: One need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion or conduct otherwise unlawful or oppressive."

Conceding that the existence of a labor dispute is not necessary in order to entitle one to protection under the Fourteenth Amendment, it is equally true that the existence or nonexistence of a labor dispute does not add to nor detract from the scope of the protection afforded by the Constitutional provisions. As stated by this Court in the case of *Carpenters' and Joiners' Union* v. *Ritter's Cafe*, *supra*:

> "The Constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved. *Thornhill* v. *Alabama*, 310 U. S. 88, 84 L. Ed. 1093,

60 S. Ct. 736, or because the communication takes the form of picketing, even when the communication does not concern a dispute between an employer and those directly employed by him. *American Federation of Labor v. Swing*, 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568. *But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater Constitutional sanction or render it completely inviolable.*" (Emphasis supplied.)

The reasoning of the Supreme Court of Missouri in this case and the result reached are not inconsistent with any expression by this Court. Whether or not a labor dispute is involved in this case, the conduct of the appellants was unlawful, and, therefore, not within the scope of the freedom of expression guaranteed by the Constitution. It was upon this basis, and upon this basis alone, that the instant case was decided by the Supreme Court of Missouri, and the Court's opinion is sustained by the controlling decisions of this Court. The interpretation and application of a state statute is involved. The public policy of the State of Missouri is the foundation upon which the court's decision rests.

II.

The decision of the Supreme Court of Missouri that the criminal law of the state has been violated is expressive of the public policy of the state and is not reviewable.

A. The public policy of the State of Missouri prohibiting conduct such as that engaged in by the appellants is firmly established in the common law of the State and is expressed in the statute involved herein.

In this case the facts upon which the opinion of the Supreme Court of Missouri is based are admitted (210 S. W. (2d) 55, l. c. 57):

"The admitted purpose of defendant's picketing is clearly in violation of Section 8301. Defendant Jenkins testified his union had made agreements with the other ice companies of Kansas City under which the companies agreed not to sell ice to non-union peddlers. By their picketing defendants were attempting to force plaintiff to become a party to such combination. A combination for the purpose of refusing to sell to a certain person or persons is in direct violation of Section 8301."

The opinion of the Court is not an isolated application of the principle in question to matters of the type herein involved. In 1908, the Supreme Court of Missouri in *Lohse Patent Door Company* v. *Fuelle, supra,* declared the policy of this state to be that a conspiracy of two or more persons to injure the business of a person by means of a boycott is illegal. While the Lohse case did not involve picketing, it nevertheless established the policy of the state with regard to conspiracies in labor disputes. This policy was restated and emphasized in the case of *Hughes* v. *Kansas City Motion Picture Machine Operators, supra.* This latter case involved picketing, and the Court held that picketing pursuant to a conspiracy to destroy business was unlawful and a proper subject for injunctive relief. The Court also held that unlawful picketing was not protected by the guaranty of freedom of speech contained in the State and Federal Constitutions. To the same effect is the decision in *Purcell* v. *Journeymen Barbers*, 234 Mo. App. 843, 133 S. W. (2d) 662.

More recently the Supreme Court of Missouri has had occasion to apply the statute involved herein in a case involving picketing for a purpose declared to be unlawful (*Fred Wolferman, Inc.*, v. *Root*, 356 Mo. 976, 204 S. W. (2d) 733). In the Wolferman case the union relied

upon the identical cases cited in appellants' brief. The Court, referring to those cases, made the sound distinction that (l. c. 736):

> "In none of these cases just referred to was the picketing carried on for an unlawful purpose."

In the Wolferman case, just as in the instant case, the picketing union sought to coerce the company to do an unlawful act.

Similiarly, in *Rogers* v. *Poteet*, *supra*, the court enjoined conduct on the part of the union for the reason that a conspiracy in violation of Section 8301 was found to exist.

This Court denied certiorari in *Rogers* v. *Poteet*, 331 U. S. 847, and in *Fred Wolferman, Inc.*, v. *Root*, 333 U. S. 837.

If the relief granted in the Wolferman and Rogers cases did not infringe constitutional rights, then the relief afforded the appellee herein does not violate such rights.

B. The construction and application of Section 8301 of the Missouri Statutes by the Supreme Court of Missouri is conclusive.

This Court has consistently followed the principle that the interpretation of a state statute by the highest court of the state will not be disturbed. (*Sara Prince* v. *Commonwealth of Mass.*, 321 U. S. 158; *General Trading Company* v. *State Tax Commission of the State of Iowa*, 322 U. S. 335; *Reconstruction Finance Corporation* v. *County of Beaver, Pa.*, 328 U. S. 204.) In the case of *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, l. c. 477, this Court said:

"Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive."

The Supreme Court of Missouri has determined that Section 8301 prohibits the conduct engaged in by the appellants. The criminal acts of the appellants and their purpose to coerce appellees to join with them in their illegal combination contravene the public policy of the State of Missouri. Under such circumstances the Court had the right, if not the duty, to protect appellee's business. This view was expressed in the case of *Gompers* v. *Buck's Stove and Range Company*, 221 U. S. 418, l. c. 439:

"Society itself is an organization, and does not object to organizations for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association. By virute of this right, powerful labor unions have been organized.

But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. *This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the Constitution; or by standing on such rights, and appealing to the preventive powers of a court of equity. When such appeal is made, it is the duty of government to protect the one against the many, as well as the many against the one.*" (Emphasis supplied.)

Conclusion.

The record in this case establishes:

I. That the appellants conspired to coerce appellees to refrain from selling ice to a certain group of its customers.

II. That to accomplish their unlawful purpose appellants picketed the premises of the appellee and effectively halted its business and that of its warehouse customers.

The appellants' purpose to restrain trade and commerce was unlawful and the means used to accomplish that purpose were likewise unlawful. Appellants' conduct, therefore, is not protected by the constitutional guaranty of freedom of speech.

We submit that the decision of the Supreme Court of Missouri sustaining the trial court's injunction is correct and in complete accord with principles long recognized by this Court. The judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

RICHARD K. PHELPS,
JERRY T. DUGGAN,
GAGE, HILLIX & PHELPS,
1007 Bryant Building,
Kansas City, Missouri,
Attorneys for Appellee.

IN THE

Supreme Court of the United States

October Term, 1948

No. 182

JOSEPH GIBONEY, HAROLD HACKELL, PAUL MANDALIA, SAM IPPOLITO, HARRY WESTON, WALTER DOWNEY, ROY UTTINGER, JAMES PIKE, TERRILL HENRY, A. J. JENKINS, Individually, and as President of the Ice and Coal Drivers and Handlers Local Union No. 953,

Appellants,

v.

EMPIRE STORAGE AND ICE COMPANY, *a Corporation.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

AMICUS CURIAE MEMORANDUM ON BEHALF OF THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AND ITS AFFILIATED ORGANIZATIONS

ARTHUR J. GOLDBERG,
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The Congress of Industrial Organizations and its affiliated organizations file the within memorandum on behalf of their members because this case involves a threat to a right which is basic to the effective functioning of a free labor movement. The decision of the court below and the statute which it applies to this case seriously curtails the constitutional right to picket.

1. This case is but the most recent manifestation of a group of cases in which state courts and legislatures have sought to undermine the constitutional rights of working people to publicize the facts relating to industrial disputes. Attacks upon the right to picket have been forwarded by distorted definitions in state statutes of "labor dispute," by arbitrarily labeling the conduct of pickets illegal or coercive, and, as in this case, by embracing such conduct within common law definitions of restraint of trade.

We have in this case but another instance of the man-

ner in which a state supreme court has demonstrated its concern "only with the question whether there was involved a labor dispute within the meaning of the [state] statutes and assumed that the legality of the injunction followed from a determination that such a dispute was not involved." *Bakery & Pastry Drivers etc.* v. *Wohl*, 315 U. S. 769, 774. And, as in *American Federation of Labor* v. *Swing*, 312 U. S. 321, 325, this Court is "asked to sustain a decree which for purposes of this case asserts . . . that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him."

2. It is not only that the controlling legal doctrines which invalidate the decision below have been fully enunciated and developed by this Court. More than that, controversies factually similar to that which gives rise to this case are familiar to this Court. For disputes over the unionization of peddlers or vendors were examined in detail in *Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91; *Milk Wagon Drivers* v. *Meadowmoor*, 312 U. S. 287, and *Bakery Drivers Union* v. *Wohl*, 315 U. S. 769. As in those cases we are dealing here with a problem which arises from the fact that non-union peddlers or vendors undermine the standards of wages or working conditions which the union has achieved for its members.

3. The competition of non-unionized peddlers or vendors of merchandise in breaking down established working standards is, as this Court has recognized, a source of serious labor disputes. Because of the high degree of mobility of the vendors and the essential difficulty of establishing effective working rules, working conditions in this area are subject to sharp deterioration. Organized drivers and helpers rapidly find that the standards achieved for them by the union are threatened with destruction by unorganized groups. Pressures upon working standards are generated by suppliers as well as customers. And even when standards are achieved, difficulties are created by problems of governance and policing. See, for example, *Milk Wagon Drivers* v. *Lake Valley Farm Products, Inc.*, *supra*; *Bakery Drivers Union* v. *Wohl*, *supra*;

Labor Aspects of the Chicago Milk Industry, Monthly Labor Review (June, 1942, p. 1283). Workers in this area, more perhaps than any single group in our economy, desperately need the protection of a union and free access to the mechanisms for concerted action to preserve their living standards.

4. The court below did not deny that the peddlers involved in this case enjoy a constitutional right to picket. Indeed, the court specifically stated that (R. 64) "There is nothing in the decree which restrains defendants from informing the public of any labor dispute they may have with the peddlers by any lawful means of dissemination of information, including picketing wherever same may be proper."

The court below did hold, however, that while the peddlers might pursue their legitimate objectives by marshaling public information in favor of their position they could not do so before the premises of the plaintiff below. It is apparent that the court deemed that the peddlers lost their rights to free speech when they sought to picket the Ice Company.

Thus, in attempting to distinguish the *Wohl* case, the court stated that while "both the baking companies which supplied the peddlers and customers of the peddlers, in some instances were picketed" the baking companies were not parties to the case and "the trial court found that no customers were turned away from the baking companies by reason of the picketing." Similarly, it pointed out that in the *Lake Valley* case the picketing was confined to the places of business of the peddlers' customers and that the dairies involved were not picketed. The court also sought to distinguish the *Magidow* case on the ground that there too the picketing was confined to the peddlers' customers.

It seems obvious that constitutional rights of vendors cannot be made to turn upon the fact that they are exercised in front of the establishment of their supplier rather than the establishment of the customer. As a regular and continuous matter a group of non-union vendors are subsidized in their resistance to the union by the Ice Company (R. 28). As far as appears from the record, the vendors deliver their wares to a scattered group of customers (R. 14). How can it be said under such circumstances that the union was required to pursue this

highly mobile non-union group to some other arena in order to marshal public opinion against its undermining of union standards?. If working men under the circumstances of the instant case are to enjoy the liberty of communication then surely picketing the Ice Company involved the "essential attributes of that liberty." *Near* v. *Minnesota*, 283 U. S. 697, 708.

The right of communication is not lost when its consequences are suffered by a supplier rather than a retailer, especially where as here it is the economic relationship of the supplier to the non-union peddlers which forms the basis for the threat to the union standards. It is the supplier who is, in the light of economic realities, the union's "real adversary." *Carpenter's Union* v. *Ritter's Cafe*, 315 U. S. 722, 727.

The limitations upon picketing established in the *Ritter's Cafe* case underline the appropriateness of picketing the economic enterprise which sustains the non-union peddlers. For this Court made it clear in that case that while the state may constitutionally insulate establishments which are industrially unrelated to the dispute, the Constitution would require a different result where as here a state seeks to exempt from the area of a labor dispute the very enterprise whose activities gave rise to it.

The court below improperly denied appellants right to picket by insisting in effect that it be exercised at a point or place where it would be ineffective in accomplishing its objective. It is obvious that the court below outlawed picketing because it effectively induced truck drivers to withhold their services from the Ice Company. In short, under the view of the court below, working men and women may enjoy free speech so long as they do not induce others to a course of action. But free speech would not be the precious right it is if the constitutional shield were withdrawn from it at the point where it invites men to a practical choice in the realm of conduct. *Abrams* v. *U. S.*, 250 U. S. 616, 630. As this Court held in *Thomas* v. *Collins*, 323 U. S. 516, 536-537, "'Free trade in ideas' means free trade in the opportunity to persuade to action not merely to describe facts."

The right to speak includes the right to speak under condi-

tions in which such speech will be meaningful and effective and this Court has pointed out, ". . . one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *New Jersey*, 308 U. S. 147, 163. Compare *Carlson* v. *California*, 310 U. S. 106.

The denial by the court below to appellants of the right to picket the Ice Company involves more than a denial of the right to speak. It also involves the right of those members of the public intimately affected by the controversy to hear the facts in a convenient and appropriate theater. Truck drivers whose working standards are directly menaced by the refusal of the non-union drivers to join the union surely have a right to be notified of such a controversy, vital to them and their livelihood, so that they may make effective choices with respect to the rendition of their services. The effect of the distinction made by the court below between picketing the supplier and the retailer is to deny easy access to a group directly affected by a controversy to the facts relating to that controversy and to deprive such group of the means of averting destruction of its group standards.

The decision below singles out a group of workers who desperately need the protections of group activity and denies them the means of making that activity effective; it deprives other workers in the same industry of an opportunity to hear and act upon grievances of fellow union members in the same industry and discriminatorily shelters one type of employer whose business activities make possible a breakdown of union standards from the economic consequences of his conduct.

5. Since this is a controversy involving unionization and the wages of helpers and not a commercial controversy in which the nexus is the price of a product (R. 44) even the court below did not, as do appellees here, rely on *Columbia River Packers Association* v. *Hinton*, 315 U. S. 143. However, the court below did single out two additional circumstances in its attempt to distinguish the vendor cases decided by this Court.

First, the court below urged that the *Wohl* case is distinguishable on the ground that it involved a struggle between two competing forms of distribution, namely, through em-

ployees of the company as against "vendors." But, contrary to the suggestion of the court below, the vendors in the *Wohl* case did not picket for the purpose of forcing a change in the distribution system of the baking company. There, as here, the object of the picketing was to unionize the vendors who occupied precisely the same relationship to the baking company as the peddlers in the instant case.

Finally, the court below sought to escape the impact of the vendor cases decided by this Court by emphasizing the fact that the employees of the Ice Company were already unionized. But the employees of the dairies involved in the *Lake Valley* case were likewise already unionized and this Court held that that circumstance did not deprive the picketing involved in that case of federal protection under the Norris-LaGuardia Act.

* * *

The picketing outlawed by the court below was in all respects peaceful and orderly. The standards which this Court has insisted must be met where freedom of expression is curtailed have not been met here. The judgment below should be reversed.

Respectfully submitted,

ARTHUR J. GOLDBERG,
General Counsel
FRANK DONNER,
THOMAS E. HARRIS,
Assistant General Counsel